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No. 07-

IN THE

Supreme Court of the United States

CITY OF NEWPORT NEWS, VIRGINIA; DENNIS A. MOOK,
Petitioners,

v.

CHRISTOPHER A. SCIOLINO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Due Process Clause of the Fourteenth Amendment provides that no State may "deprive any person of life, liberty, or property, without due process of law." Under this Court's precedents, the "liberty" component of the Due Process Clause includes the right to a name-clearing hearing for a government employee who is terminated on the basis of stigmatizing charges if those charges are "made public." *Bishop v. Wood*, 426 U.S. 341 (1976). A sharp conflict has developed among the federal circuits concerning the meaning of this "publication" requirement when a local government terminates an employee and does nothing more than place the reasons for that termination in the former employee's personnel file. As Judge Wilkinson observed: "To say there is a circuit split is at once true and not indicative of the full extent of the problem. Whether a liberty interest is infringed by a letter in a file drawer has generated answers with shades and permutations that mock the clarity law must provide for human conduct." App. 20a.

The question presented is:

When a government employer takes no steps to publicize the reasons for an employee's termination, but places the allegedly false stigmatizing reasons for the termination in the employee's personnel file, does the Due Process Clause require the employer to provide the terminated employee with a name-clearing hearing?

PARTIES TO THE PROCEEDING

Petitioners are the City of Newport News, Virginia, and Dennis A. Mook, defendants-appellees below.

Respondent is Christopher A. Sciolino, plaintiff-appellant below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

A. Legal Background 3

B. Factual Background 5

C. Proceedings Below 5

REASONS FOR GRANTING THE PETITION 10

I. THE DECISION BELOW CONFLICTS WITH *BISHOP v. WOOD* 10

II. THE FEDERAL CIRCUITS ARE DIVIDED OVER THE QUESTION PRESENTED HERE 12

A. Three Circuits Have Followed *Bishop* And Held That A Government Employer Need Not Provide A Name-Clearing Hearing To A Terminated Employee In The Absence Of Actual Public Dissemination Of The Reasons For Termination 13

TABLE OF CONTENTS
(continued)

Page

B. Seven Circuits Require A Government Employer To Provide A Hearing To A Terminated Employee Even Where The Reasons For The Termination Have Not Been Actually Disseminated 16

III. THE QUESTION PRESENTED IS OF GREAT PRACTICAL IMPORTANCE TO STATE AND LOCAL GOVERNMENTS 21

A. The Decision Below Imposes An Unwarranted Level Of Federal Interference In Matters Of State And Local Government 22

B. The Decision Below Inhibits Full Communication Between Government Employers And Their Employees 24

C. The Decision Below Encourages Litigation Whenever A Former Employee Disputes The Basis Of Dismissal 26

CONCLUSION 27

APPENDIX 1a

Appendix A: Fourth Circuit Court of Appeals Opinion 1a

Appendix B: District Court Memorandum Opinion & Order Granting Motion To Dismiss Amended Complaint 36a

Appendix C: District Court Memorandum Order Denying Motions to Alter Judgment and for Leave to File Amended Complaint 49a

TABLE OF CONTENTS
(continued)

Page

Appendix D: Fourth Circuit Court of Appeals Order Denying Petition for Rehearing En Banc 54a

Appendix E: Fourth Circuit Court of Appeals Corrected Order Denying Petition for Rehearing En Banc 55a

Appendix F: Amended Complaint 56a

TABLE OF AUTHORITIES

Page(s)

CASES

Bailey v. Kirk,
777 F.2d 567 (10th Cir. 1985).....17, 18, 19

Beitzell v. Jeffrey,
643 F.2d 870 (1st Cir. 1981).....14

Bishop v. Wood,
426 U.S. 341 (1976).....passim

Board of Regents v. Roth,
408 U.S. 564 (1972).....3, 4, 9

Brandt v. Board of Cooperative Educational Services,
820 F.2d 41 (2d Cir. 1987).....13, 17, 18, 27

Brennan v. Hendrigan,
888 F.2d 189 (1st Cir. 1989).....23

Burton v. Town of Littleton,
426 F.3d 9 (1st Cir. 2005).....passim

Buxton v. Plant City,
871 F.2d 1037 (11th Cir. 1989).....18, 19

Cartwright v. Wilbanks,
541 S.E.2d 393 (Ga. Ct. App. 2000).....12, 16

Clark v. Mann,
562 F.2d 1104 (8th Cir. 1977).....19

Cleveland Bd. of Educ. v. Loudermill,
470 U.S. 532 (1985).....4

Copeland v. Philadelphia Police Department,
840 F.2d 1139 (3d Cir. 1988).....15

Cox v. Roskelley,
359 F.3d 1105 (9th Cir. 2004).....12, 19

TABLE OF AUTHORITIES
(continued)

Page(s)

Dep't of Military & Veterans Affairs v. Bowen,
953 P.2d 888 (Alaska 1998).....20

Donato v. Plainview-Old Bethpage Cent. Sch. Dist.,
96 F.3d 623 (2d Cir. 1996).....17, 21

Garcetti v. Ceballos,
126 S. Ct. 1951 (2006).....22

Hogue v. Clinton,
791 F.2d 1318 (8th Cir. 1986).....19

Hughes v. City of Garland,
204 F.3d 223 (5th Cir. 2000).....19

In re Selcraig,
705 F.2d 789 (5th Cir. 1983).....19

Johnson v. Martin,
943 F.2d 15 (7th Cir. 1991).....11, 13

Leonard v. District of Columbia,
794 A.2d 618 (D.C. 2002).....20

Lubey v. City & County of San Francisco,
159 Cal. Rptr. 440 (Cal. Ct. App. 1979).....21

Montoya v. Law Enforcement Merit Sys. Council,
713 P.2d 309 (Ariz. Ct. App. 1985).....21

Olivieri v. Rodriguez,
122 F.3d 406 (7th Cir. 1997).....12, 14, 23

Ortega-Rosario v. Alvarado-Ortiz,
917 F.2d 71 (1st Cir. 1990).....15

Paul v. Davis,
424 U.S. 693 (1976).....4, 9

TABLE OF AUTHORITIES
(continued)

Page(s)

Phillips v. State,
725 N.W.2d 778 (Minn. Ct. App. 2007) 15

Raposa v. Meade School Dist.,
790 F.2d 1349 (8th Cir. 1986).....20

RJB Props. v. Bd. of Educ.,
468 F.3d 1005 (7th Cir. 2006).....14

Russell v. Hodges,
470 F.2d 212 (2d Cir. 1972).....25

Simonson v. Iowa St. Univ.,
603 N.W.2d 557 (Iowa 1999) 15

Stetson v. Bd. of Selectmen of Carlisle,
343 N.E.2d 382 (Mass. 1976) 20

Swinton v. Safir,
720 N.E.2d 89, 92 (N.Y. 1999).....12, 16

STATUTES AND CONSTITUTIONAL PROVISIONS

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983.....2, 5

U.S. Const. amend. XIV, § 1 .....1, 3

OTHER AUTHORITIES

Jenny S. Brannan, Comment, *The Publication Debate in Deprivation of Occupational Liberty Claims*, 47 Kan. L. Rev. 171 (1998).....12, 20, 21

The Random House Dictionary of the English Language 562 (2d ed. 1987) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Nat Stern, *Defamed But Retained Public Employees: Addressing A Gap In Due Process Jurisprudence*, 31 Hofstra L. Rev. 795 (2003) 12

PETITION FOR A WRIT OF CERTIORARI

Petitioners City of Newport News, Virginia, and Dennis A. Mook (collectively, "the City") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 480 F.3d 642, and is reprinted in the Appendix to the Petition ("App.") at 1a-35a. The district court's order granting the City's motion to dismiss the Amended Complaint is unreported and is reprinted in the Appendix at App. 36a-48a.

JURISDICTION

The court of appeals issued its decision on March 12, 2007. App. 1a. An order denying petitioners' petition for rehearing en banc was entered on April 10, 2007. App. 54a. A corrected order denying the petition for rehearing en banc was entered on April 11, 2007. App. 55a. Judge Wilkinson voted to grant panel rehearing. *Id.* On June 25, 2007, Chief Justice Roberts granted an extension of time to file a petition for a writ of certiorari to August 8, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

The City terminated respondent Christopher A. Sciolino from his job as a police officer for destroying public property by tampering with the odometer on his police cruiser. The reason for the termination was placed in his personnel file. Pursuant to 42 U.S.C. § 1983, Sciolino filed suit, asserting

that the City's actions deprived him of due process. App. 57a. Sciolino alleged that the Due Process Clause required the City to provide him with a hearing to defend his professional reputation even though petitioners had not made public the allegedly false and stigmatizing grounds for termination. The court below held that a name-clearing hearing is constitutionally required if Sciolino can show that respondents are "likely" to make the odometer-tampering charges public.

As Judge Wilkinson emphasized in his "vigorous" dissent (App. 17a), the court's decision conflicts with *Bishop v. Wood*, 426 U.S. 341 (1976). In *Bishop*, this Court held that the Due Process Clause guarantees a name-clearing hearing only when there is "*public disclosure* of the reasons for the discharge." *Id.* at 348 (emphasis added). There can be no deprivation of a liberty interest where there is only a hypothetical prospect of serious harm to a terminated employee's professional reputation, a limitation embodied in the publication requirement. App. 32a. Because the City took no steps to publicize the charges against Sciolino, the Due Process Clause was not implicated by the routine act of placing the reasons for his termination in a personnel folder.

Not only does the decision below conflict with a controlling decision of this Court, but it also deepens a decades-old conflict among the circuits. As Judge Wilkinson observed: "To say there is a circuit split is at once true and not indicative of the full extent of the problem. Whether a liberty interest is infringed by a letter in a file drawer has generated answers with shades and permutations that mock the clarity law must provide for human conduct." App. 20a.

Judge Wilkinson also explained that the question presented is of great practical importance to government employers because it implicates the day-to-day administration of personnel matters in state and municipal governmental offices throughout the country. Left undisturbed, the legacy

of the decision below and those like it will be an unwarranted level of federal interference in matters of local concern, inhibition of open and honest communication between government employers and employees, and a significant increase in the litigation burden on state and local governments.

In short, the decision below is in square conflict with a controlling decision of this Court, deepens a widely recognized conflict in the circuits, and incorrectly resolves an issue of great practical impc tance to state and local governments. Certiorari is warranted.

A. Legal Background

The Due Process Clause of the Fourteenth Amendment guarantees that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In a series of seminal cases, this Court has established three basic principles governing the contours of a due process "liberty" interest.

First, termination from government employment alone is insufficient to implicate a liberty interest in reputation. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Court rejected the notion that a former employee's liberty interest was infringed merely by the fact that a government employer did not renew his contract, even though that non-renewal might make it more difficult for the employee to find future employment. In deciding not to rehire the plaintiff, the state had not made any allegations "that might seriously damage his standing and associations in his community" – *i.e.*, the state did not accuse him of "dishonesty[] or immorality" or otherwise damage his "good name, reputation, honor, or integrity." *Id.* at 573. Nor did it "impose[] on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Id.* And although an individual's liberty interest includes the right "to engage in any of the common occupations of life," *id.* at 572, "it

stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another," *id.* at 575.

Second, in *Paul v. Davis*, 424 U.S. 693 (1976), the Court held that government-inflicted defamation standing alone does not establish a deprivation of a liberty interest. As the Court explained, "reputation alone, apart from some more tangible interests such as employment, is [n]either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Id.* at 701. Thus, "the mere defamation of an individual," no matter how damaging to the individual's reputation, is not "sufficient to invoke the guarantees of procedural due process absent an accompanying loss of government employment." *Id.* at 706.

Third, in *Bishop v. Wood*, 426 U.S. 341 (1976), the Court synthesized *Roth* and *Paul*, holding that no liberty interest in reputation is infringed where a government employee is terminated but "there is no *public disclosure* of the reasons for the discharge." *Id.* at 348 (emphasis added). In *Bishop*, plaintiff was discharged as a policeman, and the reasons for the discharge – including "failure to follow certain orders, poor attendance at police training classes, causing low morale, and conduct unsuited to an officer" – were communicated to him orally and in private, but were not publicly disclosed. As the Court explained, because the "communication was not *made public*, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honor, or integrity' was thereby impaired." *Id.* (emphasis added). Any other result would "penalize forthright and truthful communication between employer and employee." *Id.* at 349. *See also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 n.13 (1985) ("the failure to allege that the reasons for the dismissal were published dooms this claim"). Thus, *Bishop* attempted to balance and advance two core goals: (1) "to protect employees from seri-

ous harm to their future employment opportunities," which requires "sufficient dissemination to actually create such a risk," and (2) "to avoid defining public dissemination so broadly as to impair the normal functioning of personnel operations in public agencies." *Burton v. Town of Littleton*, 426 F.3d 9, 16 (1st Cir. 2005).

B. Factual Background

Respondent Christopher A. Sciolino was hired by Petitioner Newport News as a police officer. App. 57a. For the initial eighteen months of his employment, Sciolino was a probationary employee and thus was not entitled to any departmental grievance rights. *Id.* Before this probationary period elapsed, Sciolino was placed on administrative duty by the Acting Chief of Police Carl D. Burt, pending an investigation into allegations that Sciolino had advanced the odometer on police cruiser 816 by approximately 10,000 miles in order to obtain a new vehicle more quickly. *Id.* Sciolino denied the charges. *Id.* Thereafter, Chief of Police Dennis A. Mook terminated Sciolino by letter, finding that he engaged in "[d]eliberate destruction or reckless use of City Property" in violation of the City's Personnel Administrative Manual. App. 60a. This letter was circulated internally and made part of Sciolino's personnel file. App. 57a, 60a.

C. Proceedings Below

Sciolino filed suit against the City, asserting a single cause of action for "denial of due process" pursuant to 42 U.S.C. § 1983. App. 57a. In his Amended Complaint, Sciolino claims that his termination letter was placed in his personnel file, which he alleges "may be available to public employers and the public at large." *Id.* He does not allege that the letter or its contents have actually been so disclosed. *Id.* He nonetheless asserts that placement of the letter in his file without a hearing "denied . . . his constitutional right to due process under the Fourteenth Amendment to the United

States Constitution," and he seeks expungement of his personnel file, a due process hearing, compensatory damages (including for lost wages, benefits, mental anguish and distress and injury to reputation), punitive damages, and attorneys' fees. App. 58a.

The City moved to dismiss the complaint, arguing that Sciolino failed to state a claim because he did not allege that the City actually publicized the charges against him. App. 36a. The district court granted the City's motion. App. 48a. The court noted that *Bishop* required the respondent to allege "that the charges were made public by his employer," although "there is some dispute over what activity constitutes information being 'made public.'" App. 40a. The court also observed that the circuit courts "appear to be split upon whether actual dissemination of material in a personnel file must occur before it is considered 'made public,' or whether the mere filing of material in such a way that it is likely that the material could be disseminated is sufficient to consider something 'made public.'" App. 41a. Finding no direct answer in the Fourth Circuit's own precedents, the court concluded that "public disclosure of defamatory information occurs when that information is placed in a personnel file that is likely to be available to prospective employers." App. 45a. Because Sciolino had only alleged that the charges "may" be disclosed, the court found that Sciolino had not alleged a likelihood of dissemination and dismissed his complaint. App. 48a. The court denied Sciolino leave to amend his complaint to allege a likelihood of dissemination. App. 53a. Sciolino appealed.

In a divided opinion, the Court of Appeals affirmed. The majority first concluded that *Bishop* did not answer the question of what constitutes "publication." In the majority's view, *Bishop* held only "that a *purely private* communication of the reasons for an employee's termination cannot form the basis for a due process claim, because there is no possibility

of the allegation affecting the individual's Fourteenth Amendment liberty interests." App. 7a. Finding no answer in *Bishop*, the court looked to other jurisdictions and agreed with the district court that "the cases from our sister circuits articulate varying standards as to the meaning of public disclosure." App. 8a.

Turning to the parties' contentions, the court rejected the City's argument that actual dissemination is required because that standard would deny a cause of action "even if a plaintiff alleged a likelihood that prospective employers would see the false and stigmatizing charges in his file." App. 9a. The majority worried that if an employee fears prospective employers might learn of the stigmatizing charges, he "must choose between finding future employment and protecting his reputation by not applying for jobs (and thus not risking the release of the stigmatizing allegations)." App. 10a. The court likewise purported to reject the "may be available" standard advocated by respondent because that would permit claims to proceed whenever there is "just a small chance" or a "slight possibility" that a "prospective employer could inspect the file, or an uncertainty as to whether the former employer would ever make the file available." App. 9a.

Thus, the majority held that "an employee must allege (and ultimately prove) a likelihood that prospective employers (i.e., employers to whom he will apply) or the public at large will inspect the file." App. 11a. According to the majority, this standard is met by an allegation that either (1) the government employer has a "practice of releasing personnel files to all inquiring employers"; or (2) it releases files only to certain employers, but the employee intends to apply for a position with one or more of those employers. *Id.* Because Sciolino had not alleged that the City was likely to publicize the reasons for his termination, the majority affirmed the dismissal of his complaint on that basis. But the court went on to reverse the district court's denial of Sciolino's motion

for leave to amend. Under the court's announced standard, amendment would not be futile and thus the court remanded for further proceedings. App. 13a.[1]

In a dissenting opinion characterized by the majority as "vehement[] and length[y]," Judge Wilkinson agreed with the majority on only one thing – the existence of a troubling conflict among the courts of appeal that "mock[s] the clarity law must provide for human conduct." App. 20a. On the substantive question, Judge Wilkinson rejected the notion "that a document in a government file drawer can violate a constitutional liberty interest in reputation and future employment" – *i.e.*, that the City may have deprived Sciolino of his due process liberty interest "by explaining in a letter to Sciolino himself that Sciolino's employment was being terminated due to alleged misconduct and then placing the letter in its files." App. 17a. Judge Wilkinson found this conclusion untenable, reasoning that the City had "done nothing but keep its own record, which it must do if it is not to act arbitrarily and if it is to protect itself from future litigation." *Id.*

In Judge Wilkinson's view, this Court has already held that actual disclosure is required. In *Bishop*, the Court found no deprivation of liberty where the charge was not "made public" or "public[ly] disclos[ed]." 426 U.S. at 347, 348. This standard, Judge Wilkinson found, admits of no ambiguity and plainly requires actual public dissemination of the reasons for termination. App. 21a. Thus, under *Bishop*, the City should not be exposed to liability merely because it engaged in ordinary record-keeping practices.

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[1] The court did not address the City's argument that it had already provided Sciolino with all the process he was due when Mook met with Sciolino to give him an opportunity to respond to the charges. *See* App. 60a ("I met with you in accordance with City Policy to provide you the opportunity to respond to the allegations against you"). The court stated only: "The referenced meeting may have afforded Sciolino all the process to which he would be due; we simply do not know that at this early stage." App. 4a.

Apart from its conflict with *Bishop*, Judge Wilkinson faulted the majority for permitting constitutional claims to proceed on the basis of speculative harm, noting "[t]he Constitution does not give courts the power to predict future harms and declare the Constitution violated before the possible harms transpire." App. 23a. Moreover, Judge Wilkinson rejected the majority's premise that a sufficient injury exists because a terminated employee might limit his job search to avoid inquiries into his prior employment. Those same concerns for professional and reputational harm were present – and explicitly acknowledged – in *Roth*, *Paul*, and *Bishop*, and yet those courts "refused to find a constitutional interest because the text and structure of the Fourteenth Amendment set too high a bar." App. 25a. The majority, Judge Wilkinson lamented, "reason[ed] from the remedy [it] wish[ed] to provide back to the creation of a constitutional wrong," and in so doing "has done violence to our constitutional text and reordered our constitutional structure. The upshot is to federalize myriad aspects of the local employment relationship without any pretense of democratic sanction." App. 23a.

Last, Judge Wilkinson found substantial reason to doubt the wisdom of the majority's likelihood standard as a matter of policy. Although former a government employee might "fear[] the release of stigmatizing allegations" and thus "feel obligated 'to choose between finding future employment and protecting his reputation by not applying for jobs,'" Judge Wilkinson stressed that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." App. 25a (quoting *Bishop*, 426 U.S. at 349). Moreover, the "likelihood" standard creates disincentives for documentation of personnel matters despite the obvious benefits of such practices for government employers and employees alike. And the majority's standard imposes an enormous burden on state and local governments by ensuring that "there is little that

state and local governments will be able to do to avoid litigation over even merit-less claims." App. 30a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH *BISHOP v. WOOD*

This case should have been decided by a straightforward application of this Court's decision in *Bishop v. Wood*, 426 U.S. 341 (1976). As Judge Wilkinson explained below, *Bishop* "directly took up the question of when allegations of employee misconduct in connection with a termination implicate a Fourteenth Amendment interest." App. 23a. In that case, a terminated police officer argued that the city had deprived him of "liberty" within the meaning of the Due Process Clause because "the reasons given for his discharge," which were communicated to him orally and in private and were not otherwise disseminated, were "so serious as to constitute a stigma that may severely damage his reputation in the community." *Id.* at 347. The Court rejected that argument, holding that a public employee who is dischargeable at will is not deprived of "liberty" when "there is no *public disclosure* of the reasons for the discharge." *Id.* at 348 (emphasis added). As the Court explained, if a "communication was not *made public*, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honor, or integrity' was thereby impaired." *Id.* (emphasis added).

Bishop made it unambiguously clear that *actual* disclosure is required. App. 23a ("If there was room for doubt about this matter, the Supreme Court eliminated it in *Bishop*."). As Judge Wilkinson explained, "[t]o 'make public' means 'to cause to become known generally' just as 'disclosure' entails 'exposure' or 'revelation,' and the majority cites no alternative definition or use that calls into doubt the meanings familiar to school children." App. 24a (quoting *The Random House Dictionary of the English Language* 562, 1562-63 (2d ed. 1987)). Yet the majority remained "in-

explicably puzzled by the Supreme Court's plain language," and its assertion that *Bishop* "did not 'resolve the question'" "wishes for ambiguity where there is none." App. 24a.[2] *Accord Johnson v. Martin*, 943 F.2d 15, 17 (7th Cir. 1991) ("Defining 'public disclosure' in a way which encompasses 'no public disclosure' is an exercise we choose not to embrace.").

The majority's lone effort to distinguish *Bishop* from this case does not withstand scrutiny. In the majority's view, *Bishop* held only "that a *purely private* communication of the reasons for an employee's termination cannot form the basis for a due process claim, because there is no possibility of the allegation affecting the individual's Fourteenth Amendment liberty interests." App. 6a-7a. But the City's letter to Sciolino, placed in his personnel file with no allegation that it has been shared outside the department, was also a "purely private" communication. In addition, the majority mistook a difference in medium – the oral communication in *Bishop*, the written communication here – for a difference in consequence. The Court's point in *Bishop* was that since the "communication was not made public, it cannot properly form the basis" of a liberty interest. 426 U.S. at 348. That reasoning is applicable to *all* communications, regardless of the format of the message.

Because the majority's decision is contrary to binding precedent of this Court, certiorari should be granted.

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[2] The "actual disclosure" requirement of *Bishop* is even more clear in view of the dissenting opinion of Justice Brennan, who would have permitted the claim to proceed in part because he found "no reason to believe that respondents will not convey these actual reasons to petitioner's prospective employers." *Id.* at 352. In other words, he found that the government employer was *likely* to disseminate the stigmatizing allegations – the standard endorsed by the majority below.

II. THE FEDERAL CIRCUITS ARE DIVIDED OVER THE QUESTION PRESENTED HERE

In the 30 years since this Court decided *Bishop* and held that an allegation must be "public[ly] disclos[ed]" in order to implicate any "liberty" interest guaranteed by the Due Process Clause of the Fourteenth Amendment, the lower courts have adopted conflicting interpretations of this requirement. Numerous federal courts have recognized the division in the law. *See, e.g., Cox v. Roskelley*, 359 F.3d 1105, 1115 (9th Cir. 2004) (Hall, J., dissenting) ("As we [have] cautioned . . . other circuits considering substantially similar issues had reached diametrically different conclusions."); *Olivieri v. Rodriguez*, 122 F.3d 406, 408-09 (7th Cir. 1997) (recognizing the persistent "intercircuit conflict"). State courts and legal commentators have also repeatedly noted the direct conflict in circuit precedent.[3]

As shown below, the federal circuits are divided 3 to 5, with an additional two circuits adopting inconsistent positions on the question presented. The First, Third and Seventh Circuits (along with several state appellate courts) have properly interpreted the publication requirement to demand *actual* publication, not merely the potential for future publication. In direct conflict, the Second, Fourth and Tenth Circuits (and several state appellate courts) have permitted

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[3] *See, e.g., Cartwright v. Wilbanks*, 541 S.E.2d 393, 396 (Ga. Ct. App. 2000) ("We recognize that the federal circuit courts are sharply and evenly divided on this issue."); *Swinton v. Safir*, 720 N.E.2d 89, 92 (N.Y. 1999) ("The Federal Circuit courts that have addressed the issue are almost equally divided."); Nat Stern, *Defamed But Retained Public Employees: Addressing A Gap In Due Process Jurisprudence*, 31 Hofstra L. Rev. 795, 800 (2003) ("[F]ederal courts of appeals have split on whether stigmatizing material in an employee's personnel file must actually be disseminated to meet *Bishop*'s requirement of publication."); Jenny S. Brannan, Comment, *The Publication Debate in Deprivation of Occupational Liberty Claims*, 47 Kan. L. Rev. 171, 183 (1998) ("*Publication Debate*") (discussing "sharp split of authority" among federal courts of appeals).

claims to proceed so long as there is a *likelihood* of future dissemination to prospective employers or the public at large. The Ninth and Eleventh Circuits have similarly held that charges are deemed "published" when they are placed in personnel files that are public records as a matter of state law. The Fifth and Eighth Circuits are internally divided.

The Court should take this opportunity to restore clarity to an important question of constitutional law.

A. Three Circuits Have Followed *Bishop* And Held That A Government Employer Need Not Provide A Name-Clearing Hearing To A Terminated Employee In The Absence Of Actual Public Dissemination Of The Reasons For Termination

The First, Third, and Seventh Circuits have enforced the plain language of *Bishop* and held that its "public disclosure" requirement demands *actual* public disclosure of allegedly false stigmatizing charges, rejecting the notion that mere placement of such charges in a personnel file is sufficient to give rise to a constitutional tort.

The Seventh Circuit has repeatedly affirmed its conclusion that no deprivation of a liberty interest may occur unless and until an allegedly stigmatizing charge is actually disseminated to prospective employers or the public at large. In *Johnson v. Martin*, 943 F.2d 15, 17 (7th Cir. 1991), the court held that "the mere existence of damaging information in [plaintiff]'s personnel file cannot give rise to a due process challenge." Plaintiff had argued, in reliance on the Second Circuit's decision in *Brandt v. Board of Cooperative Educational Services*, 820 F.2d 41 (2d Cir. 1987), that he need only demonstrate a likelihood that the charges in his file would be publicly disseminated. The court specifically rejected this position as inconsistent with *Bishop*, and refused to hold "that 'public disclosure' actually means '*likelihood* of public disclosure.'" 943 F.2d at 16. To the contrary, the court explained that "[d]efining 'public disclosure' in a way which

encompasses 'no public disclosure' is an exercise we choose not to embrace." *Id.* at 17. Thus, the court had "no problem determining that potentially stigmatizing information which remains in a discharged employees personnel file and has not been disseminated beyond the proper chain of command within the police department has not been made public." *Id.* *See also RJB Props. v. Bd. of Educ.*, 468 F.3d 1005 (7th Cir. 2006) (rejecting argument that "the Board disseminated stigmatizing information by placing it in documents available to the public under the Illinois Freedom of Information Act"); *Olivieri*, 122 F.3d at 408-09 (acknowledging "intercircuit conflict," but stating that "[o]ur court, however, insists on dissemination").

Likewise, the First Circuit has "emphasized in [its] caselaw that public dissemination is the sine qua non of a due process claim based on reputational harm." *Burton v. Town of Littleton*, 426 F.3d 9, 17 (1st Cir. 2005). In that case, a teacher was fired, and her termination letter was sent to the Commissioner of Education. *Id.* at 15. The court rejected the notion that sending the letter to the Commissioner was sufficient to constitute publication, because the court traditionally had only recognized truly public dissemination, such as "'at public meetings or to the press.'" *Id.* at 16 (quoting *Beitzell v. Jeffrey*, 643 F.2d 870, 879 (1st Cir. 1981)).[4] Because there can be no harm absent disclosure, "the placement of damaging information in a personnel file, without further dissemination, is not sufficient to trigger the constitutional tort." *Id.* at 18. *See also id.* at 15-16 ("*Bishop* is concerned not with hypothetical or merely possible reputational harms to public employees, but with significant infringements on their liberty interests."). With respect to the plaintiff in that

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[4] Plaintiff also insinuated that her continued unemployment was linked to materials in her personnel file, but she had no evidence of actual disclosure. *Id.* at 16. The court rejected this argument as well, requiring actual evidence of dissemination rather than "innuendo." *Id.*

case, the court found that "[t]he risk of harm to [his] ability to get a job is too ephemeral for this disclosure to constitute public dissemination under *Bishop*." *Id.*[5]

The Third Circuit, too, has rejected due process claims asserting a deprivation of liberty where the public employer did not actually disseminate the allegedly stigmatizing charges. In *Copeland v. Philadelphia Police Department*, 840 F.2d 1139 (3d Cir. 1988), the plaintiff alleged only that the "presence of information relating to his termination in his personnel file raises an inference that the city intends to communicate this information to prospective employers," and that this inference was strengthened by the fact that he had been unable to find subsequent employment. *Id.* at 1148. The court rejected this argument, holding that the inclusion of the charges in his personnel file was insufficient, and that plaintiff "must produce evidence that the reason for his termination was made public by the city." *Id.*

Similarly, courts in at least four states – Minnesota, Iowa, Georgia, and New York – have followed the First, Third and Seventh Circuits in requiring actual dissemination of stigmatizing charges in order to give rise to a state or federal constitutional due process liberty interest. *See Phillips v. State*, 725 N.W.2d 778, 784 (Minn. Ct. App. 2007) (no deprivation of liberty interest where defendant "did not make public either the letter informing [plaintiff] of [its] decision not to rehire him or the investigator's report substantiating the sexual-harassment allegation"); *Simonson v. Iowa St. Univ.*, 603 N.W.2d 557, 564-65 (Iowa 1999) (rejecting due process claim where there was no evidence the defendant

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[5] *See also Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 75 (1st Cir. 1990) ("Even when a false and defamatory reason is cited for discharging a public employee, the employee is not deprived of 'liberty' unless that reason is communicated to others, because otherwise, 'it cannot properly form the basis for a claim that [the employee's] interest in his 'good name, reputation, honor, or integrity' was thereby impaired." (quoting *Bishop*, 426 U.S. at 348)).

publicly disclosed the reason for the disciplinary action; "Liberty interests are not violated by the private disclosure of reasons for discharge from public employment when there is no public disclosure of the reasons for the discharge." (quotations omitted)); *cf. Cartwright v. Wilbanks*, 541 S.E.2d 393, 396 (Ga. Ct. App. 2000) ("We recognize that the federal circuit courts are sharply and evenly divided on this issue. But, under Georgia law, precedent is clear that where a supervisor has a duty to report a matter, his report is not considered published for purposes of the tort of libel merely because it has been placed in the subject employee's personnel file."). The highest court of New York has also required actual dissemination when the plaintiff, like the respondent here, seeks damages. *See Swinton v. Safir*, 720 N.E.2d 89, 93 (N.Y. 1999) (where damages are sought, "[r]equiring proof of actual dissemination makes sense").

B. Seven Circuits Require A Government Employer To Provide A Hearing To A Terminated Employee Even Where The Reasons For The Termination Have Not Been Actually Disseminated

Courts in seven circuits have rejected the plain meaning of *Bishop* and allowed due process claims to proceed in the absence of any allegation that the reasons for termination have actually been disseminated to any prospective employer or the public at large. Although the precise allegations necessary to trigger such a claim vary somewhat among the jurisdictions, the common thread is that all of these courts recognize constitutional torts on the basis of the mere potential for *future* dissemination.

1. In direct conflict with the jurisdictions just discussed, three Circuits – the Second, Fourth, and Tenth – recognize due process claims where the basis for the discharge has not yet been publicly disseminated, but the allegedly false and stigmatizing charges in a personnel file are "likely" to be disseminated to prospective employers.

In *Brandt v. Board of Cooperative Educational Services*, 820 F.2d 41 (2d Cir. 1987), the district court granted summary judgment to the school board on plaintiff's claim that his liberty rights had been violated by placement of allegedly stigmatizing charges in his personnel file. The Second Circuit reversed, holding that "the presence of the charges in his personnel file satisfies the 'public disclosure' requirement because there is a likelihood that these charges may be disclosed in the future." *Id.* at 44. The *Brandt* court read *Bishop* to leave unanswered the question of what constitutes "public disclosure," and concluded that the standard "is not a self-defining concept." *Id.* In its view, "[t]he purpose of the requirement is to limit a constitutional claim to those instances where the stigmatizing charges made in the course of discharge have been or are *likely to be disseminated* widely enough to damage the discharged employee's standing in the community or foreclose future job opportunities." *Id.* (emphasis added). Applying this standard, the *Brandt* court found summary judgment to be inappropriate because the employer "did not stipulate that it would never disclose the charges to [plaintiff's] prospective employers." *Id.* On remand, plaintiff would be given the opportunity to show "that prospective employers are likely to gain access to his personnel file and decide not to hire him." *Id.* at 45. The result would be no different even if the employee authorized the release of his file. *Id.*[6]

The Tenth Circuit has reached a similar conclusion. In *Bailey v. Kirk*, 777 F.2d 567, 580 n.18 (10th Cir. 1985), the court permitted a due process claim to proceed in the absence of any allegation of actual dissemination of the reasons for termination. Like the Second Circuit, the court found it

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[6] *See also Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 632 (2d Cir. 1996) ("This [publication] requirement is 'satisfied where the stigmatizing charges are placed in the discharged employee's personnel file and are likely to be disclosed to prospective employers.'" (quoting *Brandt*, 820 F.2d at 45)).

sufficient that there was a possibility that such disclosure might take place in the future, stating that "the presence of false and defamatory information in an employee's personnel file may constitute 'publication' if not restricted for internal use." *Bailey v. Kirk*, 777 F.2d 567, 580 n.18 (10th Cir. 1985). *See also Brandt*, 820 F.2d at 45 (citing *Bailey* for "likelihood" standard).

In the opinion below, the Fourth Circuit aligned itself with the Second and Tenth Circuits, reasoning that if terminated employees had to wait until adverse reasons for termination were actually shared with potential employers to receive a name-clearing hearing, they might be forced to choose between seeking employment and protecting their reputation. App. 10a. Thus, the majority held that "an employee must allege (and ultimately prove) a likelihood that prospective employers (i.e., employers to whom he will apply) or the public at large will inspect the file." App. 11a.

2. Other circuits have adopted an array of varying but similarly permissive requirements. Despite their "shades and permutations," App. 20a, the standards in all of these courts would permit a constitutional tort claim to proceed where allegedly false and stigmatizing charges have been placed in a personnel file, even though there has been no actual dissemination of those charges.

The Ninth and Eleventh Circuits have so held in the context of applicable state public records statutes. In *Buxton v. Plant City*, 871 F.2d 1037 (11th Cir. 1989), a former police officer complained that he was deprived of his liberty interest by placement of certain materials in his personnel file and by an internal affairs report, both of which were public records under Florida law. Because the materials were public records and therefore "the information in the file may be reviewed years after it is filed," the court concluded that "its publication, for due process purposes, must be held to occur at the time of filing." *Id.* at 1045. In the court's view,

"[p]rotection of the due process name clearing right cannot be effectively afforded any other way." *Id.* Following *Buxton*, the Ninth Circuit held in *Cox v. Roskelley*, 359 F.3d 1105 (9th Cir. 2004), that "placement of the stigmatizing information in [plaintiff's] personnel file, in the face of a state statute mandating release upon request, constituted publication sufficient to trigger [plaintiff's] liberty interest under the Fourteenth Amendment." *Id.* at 1112. Neither of these circuits has addressed the question in the absence of a public records statute.

As a practical matter, both the Fifth and Eighth Circuits also require a government employer to provide a name-clearing hearing every time an employee is terminated. Panels in each circuit have held that the mere likelihood of dissemination of the reasons for termination warrants a hearing. *See In re Selcraig*, 705 F.2d 789, 796 n.6 (5th Cir. 1983) (former employee must show "that his employer has made or is likely to make the allegedly stigmatizing charges public in any official or intentional manner") (internal quotations omitted); *Hogue v. Clinton*, 791 F.2d 1318, 1323 n.7 (8th Cir. 1986) ("That 'Hogue's personnel file is replete with wrongdoing,' however, may be a sufficient publication if the defendants made that file available to prospective employers." (quoting *Bailey v. Kirk*, 777 F.2d 567, 580 n.18 (10th Cir. 1985))); *Clark v. Mann*, 562 F.2d 1104, 1116 (8th Cir. 1977) (sufficient that a charge "would be available to prospective employers"). Thus, the prudent government employer in both circuits will provide such a hearing.

Nevertheless, as Judge Wilkinson noted, the law in the Fifth and Eighth circuits is inconsistent. Judge Wilkinson observed that the Fifth Circuit's cases "seem to be in some internal tension." App. 19a (citing *Hughes v. City of Garland*, 204 F.3d 223, 228 (5th Cir. 2000) (rejecting likelihood-of-disclosure argument because the "mere presence of the [] page in Hughes' personnel file is insufficient to create a tri-

able issue on the public disclosure element of her claim")). Similarly, the Eighth Circuit, as Judge Wilkinson recognized, "do[es] not fit neatly" into the "camps" established by the other circuits. App. 19a. *See, e.g.*, *Raposa v. Meade School Dist.*, 790 F.2d 1349, 1354 (8th Cir. 1986) (requiring actual disclosure; "[Plaintiff] asserts that her reputation has been damaged and her employment prospects impaired by the written complaints put in her personnel file. However, she does not allege, nor did she prove, that her files were provided to any other school."). *See also* Brannan, *Publication Debate*, 47 Kan. L. Rev. at 186 ("the Eighth Circuit's position on the publication issue is unclear").

3. Several state courts, including the courts of last resort in Alaska, Massachusetts and the District of Columbia, have also permitted state or federal due process claims to proceed in the absence of an allegation that the basis for a termination has actually been disseminated to prospective employers or the general public. *See Dep't of Military & Veterans Affairs v. Bowen*, 953 P.2d 888, 901 (Alaska 1998) ("cited reason for Bowen's discharge, 'misconduct,' is sufficiently stigmatizing to implicate a liberty interest triggering due process protection"; no allegation of public disclosure); *Stetson v. Bd. of Selectmen of Carlisle*, 343 N.E.2d 382, 387 (Mass. 1976) ("We think dismissal because of immoral, illegal conduct . . . entitles the employee to notice of the reasons for his discharge and a hearing on them, if those charges have been or *are likely to be disseminated* either to members of the public or to prospective employers.") (emphasis added); *Leonard v. District of Columbia*, 794 A.2d 618, 629 (D.C. 2002) ("However, the requirement of public disclosure of the defamatory statement can be satisfied 'where the stigmatizing charges are placed in the discharged employee's personnel file and *are likely to be disclosed* to prospective employ-

ers.'" (quoting *Donato*, 96 F.3d at 631-32) (emphasis added).[7]

* * *

The Court has not addressed the question of what constitutes public disclosure since *Bishop* was decided more than 30 years ago. The split that has developed in the wake of that decision is deep and intolerable. As one commentator observed, until this Court "decides whether the presence of stigmatizing material in a discharged employee's personnel file constitutes publication, the federal courts of appeals will continue to provide inconsistent protection to public employees asserting deprivation of occupational liberty claims." Brannan, *Publication Debate*, 47 Kan. L. Rev. at 207-08.

III. THE QUESTION PRESENTED IS OF GREAT PRACTICAL IMPORTANCE TO STATE AND LOCAL GOVERNMENTS

As explained by Judge Wilkinson below and by those courts that have faithfully interpreted *Bishop*, permitting a due process claim to proceed in the absence of any allegation of present injury to professional reputation is not only wrong as a matter of constitutional interpretation, but it also is bad policy. The permissive rules adopted in the court below and elsewhere serve to federalize the relationship between state and local governments and their employees, stifle open and

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[7] *See also Lubey v. City & County of San Francisco*, 159 Cal. Rptr. 440, 444 (Cal. Ct. App. 1979) (permitting claim to proceed where court found the personnel files were not confidential, and noting "we must also realistically assume that in the officers' future applications for employment, inquiry will be made of their prior job experience, and then into the reasons for their termination as policemen"); *Montoya v. Law Enforcement Merit Sys. Council*, 713 P.2d 309, 311 (Ariz. Ct. App. 1985) ("And although the state did not 'publicly' announce these allegations, the stigmatizing consequence exists because the charges were made part of Montoya's personnel record.").

honest communication between governmental employers and employees, and generate meritless litigation.

A. The Decision Below Imposes An Unwarranted Level Of Federal Interference In Matters Of State And Local Government

In *Bishop*, the Court emphasized that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." 426 U.S. at 349. Rejecting the suggestion "that almost every discharge implicates a constitutionally protected liberty interest," the Court explained that "the ultimate control of state personnel relationships is, and will remain, with the States." *Id.* at 350. The Court's effort to constrain the scope of federal oversight of such relationships, however, would be undone by the decision of the court of appeals and others like it, which would permit constitutional tort claims to be maintained on the strength of a terminated employee's mere speculation that the reasons for his discharge are likely to be shared with potential employers at some point in the future.

Judge Wilkinson explicitly recognized the impermissible federal interference in government personnel decisions that would result from the low bar set by the majority. "Holdings that would 'mandat[e] judicial oversight of communications between and among government employees and their superiors in the course of official business,'" he warned, "can lead to 'permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and separation of powers.'" App. 21a (quoting *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1961 (2006)). The First Circuit as well has recognized that the rule adopted by the majority here "threaten[s] public agencies with exactly the sort of micromanagement against which the *Bishop* Court cautioned." *Burton*, 426 F.3d at 18.

This "micromanagement" undermines the role of state and local governments in setting their own policies and addressing internal personnel matters, "invad[ing] an area in which state and local officials are often better equipped than judges to make decisions." App. 26a. The Constitution does not impose a one-size-fits-all set of procedural protections that must be employed with respect to all personnel decisions. As Judge Wilkinson explained, "[w]hether benefits of accuracy and fairness justify the costs of particular procedural safeguards is not a question that can be answered in the abstract and for all time." *Id.* Thus, state and local officials must be afforded some leeway in determining the appropriate procedures, consistent with constitutional requirements.

The alternative, under the rule endorsed by the majority below, would tie the hands of public agencies in ways not contemplated by the constitutional text. For instance, as several circuits have observed, requiring a name-clearing hearing whenever there is a potential for future actual dissemination "comes close to arguing that there is no such thing as probationary public employment – that no public employee can be fired without a hearing because if he is, and the ground of the discharge impugns his fitness for employment in a similar job, as it very often will, his employer will have violated his constitutional rights, no matter how secretive the employer is about the ground." *Olivieri*, 122 F.3d at 409. Similarly, the First Circuit has explained that creating a constitutional tort where there has been no actual dissemination would "undermine the state legislature's decision to create a probationary period in which new teachers can be terminated without process." *Burton*, 426 F.3d at 18. *See also Brennan v. Hendrigan*, 888 F.2d 189, 196 (1st Cir. 1989) (requiring a name-clearing hearing the absence of actual dissemination "would simply erase in many instances the constitutional distinction between the 'at will' and the 'tenured' employee").

In short, it simply is not the case that a federal constitutional cause of action must or should exist in order to remedy every routine government employment decision. As Judge Wilkinson explained: "The loss of a government job and a filed record detailing the reasons for that loss are obviously no small matter. But the Constitution cannot possibly remedy every wrong experienced in life or for that matter every wrong experienced at the hand of some public entity." App. 21a. The majority's expansion of federal authority over state and local government personnel management simply cannot be reconciled with the goal of *Bishop* or with longstanding principles of federalism.

B. The Decision Below Inhibits Communication Between Government Employers And Their Employees

In articulating the "public disclosure" requirement in *Bishop*, the Court cautioned that permitting liability in the absence of actual dissemination "would penalize forthright and truthful communication between employer and employee," a result the Court would not sanction. 426 U.S. at 349. *See also Burton*, 426 F.3d at 16 ("The [*Bishop*] doctrine . . . seeks to avoid defining public dissemination so broadly as to impair the normal functioning of personnel operations in public agencies."). Careful and thorough documentation of personnel decisions is a practice that serves both employers and employees well. It benefits employees by guarding against arbitrary disciplinary actions, and aids employers by ensuring the creation of records needed to defend against lawsuits claiming discrimination or other improper reasons for dismissal. App. 26a-27a ("Governments may also record these reasons in order to defend themselves in the event that a former employee claims a dismissal was based upon race, sex, or some other impermissible consideration."). The rule adopted by the court of appeals, how-

ever, would penalize, and thus discourage, such necessary and sensible record-keeping.

Judge Wilkinson outlined the various ways in which the expansion of constitutional tort liability endorsed by the majority would disrupt the day-to-day administration of personnel matters. Attaching potential liability to documents in a personnel file, he commented, "may make government processes less fair and more arbitrary" by doing just what *Bishop* cautioned against – "'penaliz[ing] forthright and truthful communication between employer and employee.'" App. 9a (quoting *Bishop*, 426 U.S. at 349). *See also Burton*, 426 F.3d at 18 ("*Bishop*'s second concern is that the ability of individuals in defendants' position to communicate within a single system of employment – say, between employer and employee – not be impaired by an overly broad understanding of what constitutes a public dissemination." (citing *Bishop*)). In particular, as Judge Wilkinson noted, "when courts open governments to liability because they provide such reasons, government employers may simply stop giving them: "'where there was no constitutional requirement for the state to do anything', Judge Friendly has written, 'the state would merely opt to give no reasons and the employee would lose the benefit of knowing what might profit him in the future.'" App. 27a (quoting *Russell v. Hodges*, 470 F.2d 212, 217 (2d Cir. 1972)). *See also Burton*, 426 F.3d at 18 (liberal interpretation of the public disclosure requirement "would likely discourage local superintendents from privately, if officially, communicating appropriate concerns about teachers to the Commissioner in his capacity as a licensing authority").

Indeed, even where documentation of disciplinary actions may be required, either as a matter of collective bargaining, policy or local law, App. 27a, the threat of liability nonetheless provides a powerful disincentive to record potentially stigmatizing charges. And these competing con-

cerns place government employers in an untenable position. As Judge Wilkinson explained, "the majority's new threat of liability may place governments between a rock and a hard place" – because "governments [have] little choice but to document the reasons for major personnel actions, . . . it is odd, to say the least, to make such records necessary and in the next breath open governments up to liability on the basis of the same documents." App. 27a-28a.

C. The Decision Below Encourages Litigation Whenever A Former Employee Disputes The Basis Of Dismissal

Judge Wilkinson is correct that "[t]here is little that state and local governments will be able to do to avoid litigation over even meritless claims under the unascertainable standards the majority imposes." App. 30a. As he explained, "[t]he majority imposes an amorphous overlay upon an area of the law where balancing tests already leave state and local governments uncertain about the nature of their obligations." App. 28a. Under the "likelihood" standard, "[g]overnment employers will have to predict whether a court would find a 'likelihood' that even confidential documents would be disclosed in the future. This vague standard imposes enormous cost even when government conduct is found to be blameless, because uncertainty over its application will give rise to litigation in the absence of harm." App. 29a.

The likelihood standard would also generate additional confusion and litigation costs because it is so fact-specific and speculative. What may constitute a "likelihood" of future dissemination is bound to vary tremendously from case to case, disabling an employer from predicting its exposure to liability. The Second Circuit's articulation of the standard demonstrates just how fact-bound and unpredictable the inquiry really is. "In determining the degree of dissemination that satisfies the 'public disclosure' requirement, we must look to the potential effect of dissemination on the em-

ployee's standing in the community and the foreclosure of job opportunities. As a result, *what is sufficient to constitute 'public disclosure' will vary with the circumstances of each case.*" *Brandt*, 820 F.2d at 44 (emphasis added). Thus, contrary to the maxim that "[t]he constitutional tort is a narrow one," *Burton*, 426 F.3d at 16, the claims of plaintiffs in jurisdictions employing a relaxed standard will be virtually immune to dismissal, and terminated employees will have a license to impose costly and lengthy litigation on their former employers, "put[ting] governments at the mercy of litigants no matter how careful the governments' conduct." App. 29a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 8, 2007

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHRISTOPHER A. SCIOLINO,
Plaintiff-Appellant

v.

CITY OF NEWPORT NEWS, VIRGINIA;
DENNIS A. MOOK, Individually
and as Chief of Police for the
City of Newport News,
Defendants-Appellees

No. 05-2229

Appeal from the United States District Court
for the Eastern District of Virginia, at Newport News.
Raymond A. Jackson, District Judge.
(CA-04-68-4)

Argued: Nov. 28, 2006

Decided: March 12, 2007

Before WILKINSON, MOTZ, and GREGORY, Circuit Judges.

Vacated and remanded by published opinion. Judge Motz wrote the opinion, in which Judge Gregory joined. Judge Wilkinson wrote a dissenting opinion.

COUNSEL

Thomas Allan Dyar, LAW OFFICE OF REID H. ERVIN, P.C., Norfolk, Virginia, for Appellant. R. Johan Conrod, Jr., KAUFMANN & CANOLES, P.C., Norfolk, Virginia; Allen Link Jackson, Chief Deputy City Attorney, CITY

ATTORNEY'S OFFICE FOR THE CITY OF NEWPORT NEWS, Newport News, Virginia, for Appellees.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

A former probationary city police officer brings this action pursuant to 42 U.S.C. § 1983 (2000). He asserts that when discharging him, the city placed in his personnel file false information damaging to his good name without granting him a name-clearing hearing, and so deprived him of liberty rights without due process of law. Because the former employee did not allege facts asserting a likelihood that prospective employers or members of the public would see the damaging information, the district court did not abuse its discretion in dismissing the employee's complaint. However, when the district court denied the employee's motion to amend his complaint in order to meet this standard, the court did abuse its discretion. Accordingly, we vacate the judgment and remand for further proceedings consistent with this opinion.

I.

In May 2002, the Newport News Police Department hired Christopher Sciolino as a police officer. Sciolino began an eighteen-month probationary period during which he was not entitled to any departmental grievance rights. On June 26, 2003, the Acting Chief of Police Carl Burt placed Sciolino on administrative duty, asserting that Sciolino had advanced the odometer of his police cruiser approximately 10,000 miles, ostensibly to get a new car sooner. Sciolino denied these charges. On September 26, 2003, Chief of Police Dennis Mook, acting on behalf of the department, terminated Sciolino's employment by letter, accusing him of deliberately destroying city property by advancing the odometer. Sciolino alleges that the department placed the letter in his personnel file.

On June 2, 2004, Sciolino brought this action against the City of Newport News and Chief Mook (in both his individual and official capacity). The City and Chief Mook (hereafter collectively "the City") moved to dismiss Sciolino's first amended complaint for failure to state a claim. The district court granted the motion, holding that in order to give rise to a due process claim, a plaintiff must allege facts asserting that damaging and false charges in his personnel file were likely to be disseminated to prospective employers or members of the public.

After dismissal, Sciolino moved to file a second amended complaint, assertedly to satisfy this standard. The district court denied Sciolino's motion to amend. Sciolino appeals both the order dismissing the case, and the order denying his motion to file an amended complaint.

II.

Sciolino contends that by placing false charges in his personnel file, which "may be available" to prospective employers, the City deprived him of Fourteenth Amendment liberty interests – in his reputation and his ability to obtain future employment – without granting him a name-clearing hearing. Like the district court, we believe that in order to state a claim under the Due Process Clause, a plaintiff must allege a likelihood that prospective employers will inspect his personnel file. Accordingly, the district court did not abuse its discretion in dismissing Sciolino's first amended complaint.

A.

Although Sciolino, as a probationary employee, has no protected "property" interest in his employment with the City, a public employer cannot deprive a probationary employee of his "freedom to take advantage of other employment opportunities." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 573 (1972). For this reason, a Fourteenth Amendment "liberty interest is implicated by

public announcement of reasons for an employee's discharge." *Johnson v. Morris*, 903 F.2d 996, 999 (4th Cir. 1990).

Sciolino's claim thus arises from the combination of two distinct rights protected by the Fourteenth Amendment: (1) the liberty "'to engage in any of the common occupations of life,'" *Roth*, 408 U.S. at 572 (*quoting Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); and (2) the right to due process "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *see also Paul v. Davis*, 424 U.S. 693, 701 (1976) (explaining that an individual's liberty interest in his reputation is only sufficient "to invoke the procedural protection of the Due Process Clause" if combined with "some more tangible interest[ ] such as employment").[1]

To state this type of liberty interest claim under the Due Process Clause, a plaintiff must allege that the charges against him: (1) placed a stigma on his reputation; (2) were

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[1] Relying solely on a letter written by Chief Mook, the City argues that Sciolino received the required "notice and opportunity to be heard" prior to his discharge. In that letter, Mook wrote to Sciolino, "On September 16, 2003, I met with you in accordance with City Policy to provide you the opportunity to respond to the allegation against you . . . ." The referenced meeting may have afforded Sciolino all the process to which he would be due; we simply do not know that at this early stage. Sciolino alleges that the City denied him "procedural rights, including a hearing" and "a forum in which he would have had the opportunity to clear his name." To determine whether the process given Sciolino suffices, a court must assess the three factors enumerated by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Applying the *Mathews* test in a similar context in *Boston v. Webb*, 783 F.2d 1163, 1166 (4th Cir. 1986), we upheld a process by which the individual, on two occasions, was given adequate notice, allowed to testify and present witnesses, and was represented by counsel. The record in this case is not sufficiently developed to make this sort of evaluation. Viewing the pleadings in the light most favorable to Sciolino, as we must at this stage, we cannot now hold that the meeting referred to in Mook's letter fulfilled the requirements of the Due Process Clause.

made public by the employer; (3) were made in conjunction with his termination or demotion; and (4) were false. *See Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 172 n.5 (4th Cir. 1988).

At this stage, the only element seriously at issue[2] is the second, the requirement that the charges have been "made public" – or that there has been a "public disclosure." *See Bishop v. Wood* 426 U.S. 341, 348 (1976). Sciolino alleges in his first amended complaint that his file "may be available" to prospective employers. Quoting our decision in *Ledford v. Delancey*, 612 F.2d 883, 886-87 (4th Cir. 1980), he argues that a plaintiff satisfies the dissemination element if he alleges that his personnel file "'*may* be the subject of inspection by prospective employers.'" Brief of Appellant at 9 (emphasis added by Appellant). In contrast, the City contends that a plaintiff must allege a specific incident of "actual publication" of the personnel file to state a claim. Brief of Appellees at 19. The district court selected an intermediate standard, holding that to state a claim the

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[2] The City also briefly contends that Sciolino's first amended complaint did not allege the first element, i.e., that the charges against Sciolino do not rise to the level of "'imply[ing] the existence of serious character defects such as dishonesty or immorality.'" Brief of Appellees at 8 (*quoting Robertson v. Rogers*, 679 F.2d 1090, 1092 (4th Cir. 1982)). We disagree. In *Robertson*, we held that "[a]llegations of incompetence" alone could not give rise to a protected liberty interest. 679 F.2d at 1092. But "we have distinguished statements that imply . . . serious character defects from statements that simply allege 'incompetence.'" *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 308-09 (4th Cir. 2006). We have noted that "charges of . . . Department regulation violations that 'smack of deliberate fraud' and 'in effect allege dishonesty'" clearly meet the *Robertson* standard and give rise to a constitutional claim. *Id.* (*quoting McNeill v. Butz*, 480 F.2d 314, 319-20 (4th Cir. 1973)). The City's charge here that Sciolino falsely advanced the odometer, thus deliberately destroying city property in violation of a Department regulation, implies "the existence of serious character defects such as dishonesty or immorality." *Robertson*, 679 F.2d at 1092. Accordingly, Sciolino's first amended complaint sufficiently alleged this element of the cause of action.

plaintiff must allege a "likelihood of dissemination" of the false charges to prospective employers.[3]

B.

Although they emphasize different portions of *Bishop* and *Ledford*, each side contends that these cases dictate the standard it espouses. Actually, neither case does so.

In *Bishop*, the Supreme Court considered the case of a discharged city police officer who sued his former employer contending that false charges accompanying his discharge "deprived him of an interest in liberty protected by" the Due Process Clause, even though his employer had not "public[ly] disclose[d] the reasons for the discharge." 426 U.S. at 343, 348. The Court held that the employer's explanation could not "properly form the basis for a claim that petitioner's interest in his good name, reputation, honor, or integrity was thereby impaired" because, since the explanation had not been made public, even if false it would have had "no different impact on his reputation than if [it] had been true." *Id.* at 348-49 (internal quotation marks omitted). *Bishop* thus holds that a *purely private*

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[3] The City's argument that Sciolino cannot possibly meet *any* public disclosure standard because his personnel file is protected from dissemination by a state statute - the Government Data Collection and Dissemination Practices Act, Va. Code Ann. §§ 2.2-3800 to 2.2-3809 – ignores the allegation in Sciolino's complaint that in practice the City discloses these files, and is belied by the City's admission that its own "official Police Department policy . . . authorizes" the police department to respond to an inquiry from a prospective employer by revealing the employee's "reason for leaving" the department. Brief of Appellees at 18 n.4. Moreover, this city policy allows the police department to reveal additional information "if the employee's history could place the requesting agency in a high liability situation," *id.* – presumably the case with an employee who has deliberately destroyed government property. At oral argument the City again conceded that "under certain circumstances there is some dissemination" by it of an employee's personnel file. Thus, the City admits not only that it is legally authorized to share personnel files with prospective employers, but also that it is its practice to do so in some circumstances.

communication of the reasons for an employee's termination cannot form the basis for a due process claim, because there is no possibility of the allegation affecting the individual's Fourteenth Amendment liberty interests.

We then took up the question, in *Ledford*, of whether "false information contained in [a discharged probationary employee's] personnel file has impaired his ability to procure other employment." 612 F.2d at 885. The district court had granted the public employer summary judgment, reasoning that "[t]he mere fact that an employer may communicate with prospective employers as to the asserted reasons for non-retention does not . . . rise to the level of an infringement of liberty." Quoted in Brief of Appellant at 16, *Ledford*, 612 F.2d 883 (4th Cir. 1980). We reversed, holding that a public employee "does have a protected right with respect to the contents of his personnel file when that file may be the subject of inspection by prospective employers." *Ledford*, 612 F.2d at 886. We explained that this standard had been satisfied because "one may fairly infer that the plaintiff has alleged that certain false information has been circulated and will continue to be circulated to prospective employers." *Id.* at 886-87. We did not hold that a plaintiff *must* allege actual dissemination of the information to a particular prospective employer, only that in the case before us "one may fairly infer" that the plaintiff *had alleged* actual dissemination.[4] And we immediately reiterated that a

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[4] It is not entirely clear from our opinion in *Ledford*, but the briefs in that case reveal that the plaintiff did, in fact, allege that his file had actually been disseminated to prospective employers. The plaintiff contended "that he was denied positions with at least three other local governmental agencies specifically because" the damaging information in his personnel file was disseminated to them. Brief of Appellant at 16, *Ledford*, 612 F.2d 883 (4th Cir. 1980). Thus, our *holding* in *Ledford* is only that a plaintiff who has alleged actual dissemination *does* have a constitutional claim. *Ledford* does not reach the question before us–whether less than actual dissemination can provide the basis for a constitutional claim–but the statements in *Ledford* quoted above and *infra* n.5 suggest that something less than actual dissemination does suffice.

"[p]laintiff has a right that his personnel file contain no substantially false information . . . when that information *is* available to prospective employers." *Id.* at 887 (emphasis added).

Not only do neither *Bishop* nor *Ledford* resolve the question before us, but also the cases from our sister circuits articulate varying standards as to the meaning of public disclosure. Some courts hold that a personnel file containing the stigmatizing statement must *actually* have been disseminated to a potential employer. *See Johnson v. Martin*, 943 F.2d 15, 16-17 (7th Cir. 1991); *cf. Burton v. Town of Littleton*, 426 F.3d 9, 15 n.5 (1st Cir. 2005) (noting that to prove dissemination a "plaintiff must marshal sufficient evidence to support a conclusion that any of the prospective employers requested, or that the defendants divulged, information regarding the circumstances surrounding [her] termination" (internal quotation marks omitted) (alteration in original)). Others hold that the mere "presence" of information in a personnel file, without more, is insufficient to require due process. *Hughes v. City of Garland*, 204 F.3d 223, 228 (5th Cir. 2000); *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1148 (3d Cir. 1988). Still others require only that the file "would be available to prospective employers," *Clark v. Mann*, 562 F.2d 1104, 1116 (8th Cir. 1977); that there must be a "possibility" that potential employers will see the information, *Bailey v. Kirk*, 777 F.2d 567, 580 n.18 (10th Cir. 1985) (*citing Burris v. Willis Indep. Sch. Dist.*, 713 F.2d 1087, 1092 (5th Cir. 1983)); or that the "presence of stigmatizing information" in a personnel file was part of the public record and so could be obtained by prospective employers, even though it had not been disseminated to any particular employer, *Buxton v. City of Plant City*, 871 F.2d 1037, 1045-46 (11th Cir. 1989). The Second Circuit requires, as the district court did here, a likelihood that the files would be seen by potential employers. *See Brandt v. Bd. of Coop. Educ. Servs.*, 820 F.2d 41, 44-45 (2d Cir. 1987) ("[T]he public disclosure

requirement has been satisfied where the stigmatizing charges are placed in the discharged employee's personnel file and are likely to be disclosed to prospective employers.").

C.

Although neither *Bishop* nor *Ledford* resolves what a plaintiff must allege to meet the "public disclosure" requirement, the Supreme Court has provided helpful guidance as to what the Due Process Clause requires.

First, of course, the Court instructed in *Bishop* that the Due Process Clause "is not a guarantee against incorrect or ill-advised personnel decisions" and that the Constitution should not "penalize forthright and truthful communication between employer and employee." *Bishop*, 426 U.S. at 350. For this reason, we agree with the district court that a plaintiff must allege more than the "mere presence" of stigmatizing charges that "may be available" to prospective employers. If we were to adopt the "may be available" standard, even if there was just a small chance that any prospective employer could inspect the file, or an uncertainty as to whether the former employer would ever make the file available, a plaintiff would still have a cause of action. But in those cases, the plaintiff would be unlikely to be deprived of future employment or to have his reputation tarnished. Accordingly, to the extent that there is just a slight possibility that stigmatizing charges in a personnel file could be available to prospective employers, the Constitution does not recognize the deprivation of a liberty interest.

Although we conclude that a plaintiff must allege more than that his file "may be available" to a prospective employer, we also reject the City's contention that a plaintiff must allege a specific instance of actual dissemination. Under the City's proposed standard, even if a plaintiff alleged a likelihood that prospective employers would see the false and stigmatizing charges in his file, he would not have a cause of action. Such an approach would be contrary to the requirements of the Fourteenth Amendment. A public

employer who fires (or refuses to rehire) an employee in a manner that sullies the employee's good name and restricts his future employment opportunities deprives him of important liberty interests protected by the Fourteenth Amendment. *See Roth*, 408 U.S. at 573. When a plaintiff alleges that his termination is based on false, stigmatizing charges that are likely to be inspected by prospective employers, he states a claim that the government has deprived him of these liberty interests.

If prospective employers are likely to see the stigmatizing allegations, an employee must choose between finding future employment and protecting his reputation by not applying for jobs (and thus not risking the release of the stigmatizing allegations). Requiring a plaintiff to "wait until he actually loses some job opportunities" would "place him between the devil and the deep blue sea." *Brandt*, 820 F.2d at 45 (internal quotation marks omitted) (adopting the likelihood standard). If a plaintiff must allege a specific instance of actual dissemination to a prospective employer, he would not be "as free as before to seek another job." *Bishop*, 426 U.S. at 348 (*quoting Roth*, 408 U.S. at 575 (internal quotation marks omitted)).

In situations like that at hand, the constitutional harm "is not the defamation" itself; rather it is "the denial of a hearing at which the dismissed employee has an opportunity to refute the public charge." *Cox v. N. Va. Transp. Comm'n*, 551 F.2d 555, 558 (4th Cir. 1976). If an allegation of actual dissemination were required, the information would have already been communicated to a potential employer, the employee's job opportunities foreclosed, and his reputation damaged *before* any possibility for a name-clearing hearing. Further, a requirement that an employer need only provide a name-clearing hearing if it actually disseminates the employee's personnel file to a specific prospective employer would be virtually impossible to enforce. Most job applicants will never know whether a prospective employer

decides against hiring them because of false damaging charges in a personnel file, or for other reasons, and would not even know if the prospective employer has learned of the charges. Therefore, a requirement that a plaintiff must allege actual disclosure to a particular prospective employer would undermine the liberties protected by the Fourteenth Amendment.

For these reasons, we believe the district court selected the appropriate standard. A plaintiff need not allege that his file has actually been disseminated to particular prospective employers. But, he must allege more than that his file "may be available" to them. We thus hold that an employee must allege (and ultimately prove) a likelihood that prospective employers (i.e., employers to whom he will apply) or the public at large will inspect the file.

A plaintiff can meet this standard in two ways. First, the employee could allege (and ultimately prove) that his former employer has a practice of releasing personnel files to all inquiring employers. Second, the employee could allege that although his former employer releases personnel files only to certain inquiring employers, that he intends to apply to at least one of these employers. In either case, he must allege that the prospective employer is likely to request the file from his former employer.[5] The likelihood standard protects

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[5] We note that our statements in *Ledford*, 612 F.2d at 886-87, that the plaintiff had a constitutional claim when his personnel file "may be the subject of inspection" by or "is available" to prospective employers, do not conflict with our holding here. Stating that a file "may be the subject of inspection" by or "is available" to prospective employers implies that employers will have the ability to inspect the file if they so choose; it does not speak to the probability that they will do so. In fact, given that employers typically request information or files of prospective employees, our language in *Ledford* points to the likelihood of dissemination standard. The likelihood standard requires a plaintiff to allege that the personnel file is available to prospective employers, and that those prospective employers not only have permission to, but are likely to, inspect the file.

the employee's constitutional liberty interests but does not unduly interfere with the employer's personnel administration. It imposes no "enormous costs," *post* at 26, because an employer need only grant a name-clearing hearing if it *will* make false damaging charges about a former employee available to those likely to request the information, e.g., future employers to whom the employee will apply.[6]

Sciolino's first amended complaint did not meet this standard because it alleged only that his file with the charges "may be available to prospective employers." We thus affirm the district court's order dismissing his complaint.

III.

Sciolino also appeals the district court's order denying his Rule 15(a) motion to file a second amended complaint – one that he intended to state a claim that would satisfy the likelihood of dissemination standard.

Sciolino's Rule 15(a) motion accompanied a Rule 59(e) motion to alter or amend the judgment of dismissal. The district court applied the appropriate standard in denying the Rule 59(e) motion because Sciolino did not identify an intervening change in controlling law, newly discovered evidence, a clear error of law, or the necessity for prevention of manifest injustice. *See Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). The district court, however, erroneously applied this same standard – rather than the standard for consideration of Rule 15(a) motions – to Sciolino's motion to amend his complaint.

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[6] Indeed, rather than there being "little that state and local governments will be *able* to do to avoid litigation" under our holding, *post* at 26-27 (emphasis added), there is little they must do: refrain from memorializing false and stigmatizing charges while dismissing an employee; *or*, if they do level such charges, provide a name-clearing opportunity; *or*, if they do not want to provide this opportunity, keep the false stigmatizing allegations private.

Under Rule 15(a), after filing a first amended complaint by right, a plaintiff may subsequently amend his complaint only with permission from the court. Still, Rule 15(a) instructs that leave to amend "shall be freely given when justice so requires." As our en banc court has recently explained, "[t]his liberal rule gives effect to the federal policy in favor of resolving cases on their merits instead of disposing of them on technicalities." *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (en banc). For this reason, "[w]e have interpreted Rule 15(a) to provide that 'leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile.'" *Id.* (*quoting Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986)). And, we have held that "a post-judgment motion to amend is evaluated under the same legal standard as a similar motion filed before judgment was entered – for prejudice, bad faith, or futility." *Id.* at 427.

There is no reason why allowing Sciolino to amend his complaint would prejudice the City, and there is no evidence of bad faith. Nor would amendment be futile. Sciolino's proposed second amended complaint alleges that it is the practice of the Newport News Police Department to disseminate former employees' personnel files to "[l]ocal and regional police departments, specifically including, and by way of example, the police departments of the cities of Suffolk and Hampton." Although the complaint does not explicitly state that Sciolino has applied to these particular employers, reading the complaint "liberally in favor of the plaintiff," *Anderson v. Found. for Advancement, Educ. and Employment of Am. Indians*, 155 F.3d 500, 505 (4th Cir. 1998) (*citing* Fed. R. Civ. P. 8; *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)), as we must, the complaint must be construed to assert that Sciolino intends to apply to these local and regional police departments. To succeed, of course, Sciolino must *prove* that a prospective employer to whom he

will apply is likely to inspect the false allegations in his personnel file; but allowing Sciolino to amend his complaint would not be futile. Accordingly, the district court abused its discretion in denying Sciolino's motion to amend his complaint.[7]

IV.

We thus chart a middle ground, adopting neither the position favored by Sciolino nor that espoused by the City. We believe that this approach best accords with the limited, but important, liberty interests at issue here and the Fourteenth Amendment's guarantee that the government will not deprive an individual of *any* liberty right "without due process."

Although our approach is a modest one, our distinguished colleague dissents vehemently and at considerable length. But stripped of professorial musings on questions not at issue here and repeated misstatements of our holding,[8] the dissent's disagreement with us devolves to a

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[7] A "district court may not grant" a post-judgment motion to amend a complaint "unless the judgment is vacated pursuant to Rule 59(e)." *Laber*, 438 F.3d at 427. Although denial of a Rule 59(e) motion may otherwise be appropriate, when a district court "abuse[s] its discretion in denying a motion to amend," this provides "sufficient grounds on which to reverse the district court's denial of a Rule 59(e) motion." *Id.* at 427-28 (*citing Foman v. Davis*, 371 U.S. 178, 182 (1962)). We therefore vacate the district court's judgment denying Sciolino's Rule 59(e) motion as well.

[8] For example, the dissent philosophizes on the merits of federalism principles and state tort law remedies, with which no one disagrees, and bemoans the asserted burdens that the Supreme Court has held the Constitution imposes on public employers, burdens that no lower court can question. The dissent also repeatedly suggests that we hold that a liberty interest can be "infringed by a letter in a file drawer," *post* at 18; *see also id.* at 15, 19, 20, 22, and 24. Of course, this is not so. What we in fact hold is that in order to state a liberty interest, an individual in Sciolino's position must allege that, in connection with his discharge, his former employer has leveled against him false, stigmatizing charges that are *likely* to be disseminated.

single contention. The dissent believes that a plaintiff in Sciolino's position has no right to an opportunity to clear his name when a former employer has dismissed him from his job *and* made false, stigmatizing allegations that are likely to be seen by future employers.

Tellingly, in support of its position the dissent can proffer only that the Supreme Court has "refused to find a constitutional interest" in the "consequences that might flow from employees' terminations *or* the records pertaining to them." *Post* at 22 (emphasis added). This contention avails the dissent not at all, for it is both irrelevant and inaccurate. The dissent's contention is irrelevant because Sciolino's claim arises from his termination *and* the "records pertaining to" it. It is inaccurate because when a plaintiff alleges, as Sciolino has, that the "records pertaining to" his termination might seriously damage his standing in the community, the Supreme Court (contrary to the dissent's contention) has in fact been willing "to find a constitutional interest" in the "consequences that might flow from . . . the[se] records." *Post* at 22. Indeed, in *Roth* itself, on which the dissent heavily relies, the Court explained that if, in connection with an adverse employment decision, the state "ma[d]e any charge against [an employee] that might seriously damage his standing and associations in his community," then "due process would accord an opportunity to refute the charge." *Roth*, 408 U.S. at 573.

So it is here. In so holding we are neither "predict[ing] future harms," *post* at 21, nor "reasoning from the remedy . . . back to the creation of a constitutional wrong," *id.* at 27-28. Rather, we are simply recognizing a present harm: the

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The dissent also incorrectly suggests (apparently to strike down a straw-man, *post* at 29) that we posit that it would create an unfair burden if a "former employee might have to seek discovery in order to be certain that he had a cause of action." *See id.* at 27. Actually, we have not so much as mentioned discovery burdens, because we believe constitutional requirements, not "practical problems" and other "matters of policy," are paramount here. *Cf. id.* at 16, 23, 23-27.

failure to provide a name-clearing hearing when an employee faces a restriction on future employment and the sullying of his good name as prospective employers learn of false, stigmatizing allegations regarding the reasons for his termination. The meaningful opportunity to "be heard to which Sciolino is entitled in these circumstances is not a remedy but a right that "due process . . . accord[s]." *Roth*, 408 U.S. at 573.[9]

To be sure, Sciolino is not entitled to many of the rights afforded some public employees (e.g. those protected by tenure or contract), but when dismissed from public employment even a probationary or at-will employee is entitled to take with him his good name. Long ago the Supreme Court determined that when "the State attaches 'a badge of infamy' to the citizen, due process comes into play." *Constantineau*, 400 U.S. at 437. Fundamental to due process is an opportunity to be heard – "an opportunity which must be granted at a meaningful time." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). An opportunity to clear your name after it has been ruined by dissemination of false, stigmatizing charges is not "meaningful."

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[9] Moreover, contrary to the dissent's suggestion, *post* at 20, 27-28, a plaintiff need not have suffered the full consequences of the deprivation of his liberty to have rights under the Due Process Clause, or standing to sue. Thus, for example, revocation of a prisoner's "good time" is a deprivation of liberty that gives rise to due process rights even though it "very likely, does not then and there work any change in the conditions of his liberty." *Wolff v. McDonnell*, 418 U.S. 539, 560-61 (1974). Indeed, "the right to be heard *before* being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (emphasis added).

V.

For the foregoing reasons we vacate the judgment of the district court, and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED

WILKINSON, Circuit Judge, dissenting:

The majority holds that a document in a government file drawer can violate a constitutional liberty interest in reputation and future employment. It holds in particular that the Newport News Police Department may have deprived former probationary employee Christopher Sciolino of "life, liberty, or property" by explaining in a letter to Sciolino himself that Sciolino's employment was being terminated due to alleged misconduct and then placing the letter in its files. So mistrustful is the majority of state and local governments that it extends the Fourteenth Amendment to forbid actions that unpredictable courts predict create a "likelihood" of future harm. In this respect, as in others, the majority fails to grapple with the many practical problems of its holding.

My fine colleagues also contend that Newport News has made "charge[s] against [Sciolino] that might seriously damage his standing and associations in his community." Maj. Op. at 14 (quoting *Roth*, 408 U.S. at 573). This implies that the city has gone public in some fashion. *See Bishop v. Wood*, 426 U.S. 341, 348 (1976) (requiring that information concerning discharge be "made public" to infringe constitutional interest). Newport News has done nothing of the sort. It has done nothing but keep its own record, which it must do if it is not to act arbitrarily and if it is to protect itself from future litigation. Thus to say that Newport News has somehow jeopardized the plaintiff's standing in the community is a complete mischaracterization of the city's conduct. There is no contention – much less evidence – that Newport News made the letter public or sent the letter to any

future employer. In fact, the majority's "likelihood" standard concedes as much. Newport News has caused the plaintiff no reputational harm. It has acted in a way that would avoid causing the plaintiff reputational harm, so it has not deprived anyone of any Fourteenth Amendment interest.

I would not create a constitutional cause of action out of record-keeping functions. I respectfully dissent from the majority's departure from constitutional text and Supreme Court precedent, a departure that extends judge-made law over routine aspects of the employment relationship in every state and local government in our circuit.

I.

There is at least one thing upon which the majority and I can agree: The circuits are split as to whether stigmatizing allegations can deprive a former government employee of a constitutional liberty interest before the allegations are disseminated to prospective employers or others.

The First and Seventh Circuits have written that such statements can only deprive a former government employee of a liberty interest when the allegations are publicly disseminated. *See Johnson v. Martin*, 943 F.2d 15, 16-17 (7th Cir. 1991); *Burton v. Town of Littleton*, 426 F.3d 9, 17 (1st Cir. 2005); *Wojcik v. Mass. State Lottery Comm'n*, 300 F.3d 92, 103 (1st Cir. 2002). The Third Circuit has suggested the same, in my view, by stating that a plaintiff "must produce evidence that the reason for his termination was made public by the city" and rejecting a plaintiff's argument that he had been deprived of liberty because future disclosure was likely. *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1148 (3d Cir. 1988).

The Second and Tenth Circuits have written, in contrast, that stigmatizing allegations can deprive a person of a liberty interest even if the allegations have not been publicly disclosed. The Second Circuit held in *Brandt v. Board of Cooperative Educational Services* that a liberty interest is

implicated "where the stigmatizing charges are placed in the discharged employee's personnel file and are *likely* to be disclosed to prospective employers." 820 F.2d 41, 45 (2d Cir. 1987) (emphasis added). The Tenth Circuit also recognized a claim based upon statements that the plaintiff did not allege went beyond a government employer's own offices. *Bailey v. Kirk*, 777 F.2d 567, 580 n.18 (10th Cir. 1985).

Other circuits do not fit neatly into these two camps. The Eighth Circuit has suggested that a claim would lie if a plaintiff established that a record "*would* be available to prospective employers," *Clark v. Mann*, 562 F.2d 1104, 1116 (8th Cir. 1977) (emphasis added), but suggested in another case that information must be disclosed before it could give rise to a cause of action, *Merritt v. Reed*, 120 F.3d 124, 126 (8th Cir. 1997).

The Fifth Circuit's cases also seem to be in some internal tension. The court appears to have sanctioned claims based upon the possibility that allegations would be disclosed in the future, writing that an ex-employee could establish deprivation of a liberty interest by showing "that his employer has made *or is likely to make* the allegedly stigmatizing charges public in any official or intentional manner." *In re Selcraig*, 705 F.2d 789, 796 n.6 (5th Cir. 1983) (emphasis added; internal quotations omitted). Yet a subsequent court rejected a plaintiff's likelihood-of-dissemination theory, equating it with an argument that "the mere presence" of stigmatizing allegations in a personnel file was sufficient to create a triable issue of fact. *Hughes v. City of Garland*, 204 F.3d 223, 228 (5th Cir. 2000).

Finally, other circuits have recognized liberty claims when authorities lacked the power to keep statements confidential because personnel files were publicly available under state law, but have not addressed whether predictions of dissemination would suffice in the absence of such statutes. *See Cox v. Roskelley*, 359 F.3d 1105, 1110-12 (9th

Cir. 2004); *Buxton v. City of Plant City*, 871 F.2d 1037, 1042-46 (11th Cir. 1989).

Thus to say there is a circuit split is at once true and not indicative of the full extent of the problem. Whether a liberty interest is infringed by a letter in a file drawer has generated answers with shades and permutations that mock the clarity law must provide for human conduct.

II.

A.

While both the majority and I recognize the circuits' division, we diverge after that. Our disagreements run first to the treatment of constitutional text and structure. The majority appears to regard the conflicting circuit court rulings as a menu from which to select the standard of liability that it believes would amount to the best policy. It concludes that a terminated public employee may raise a Fourteenth Amendment claim based upon stigmatizing information in government personnel files even if the charges have never been made public,[10] so long as the plaintiff alleges "a likelihood that prospective employers . . . or the public at large will inspect the file" at some point in the future. Maj. Op. at 10. I reject this conclusion because far from authorizing the creation of such an interest, constitutional text and Supreme Court precedent foreclose both the holding in this case and the approach used to reach it.

While the rights of public employees may be protected in many different ways, the text of the Fourteenth Amendment does not permit the recognition of a liberty interest in not having stigmatizing information on file. By declaring that no state shall "deprive any person of life, liberty, or property,

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[10] The plaintiff may have made the allegations against him publicly available by filing his lawsuit, but the Supreme Court has held that self-generated exposure in litigation does not give rise to a constitutional claim. *Bishop v. Wood*, 426 U.S. 341, 348-49 (1976).

without due process of law," the amendment permits judicial oversight of government procedures relating only to actions that "deprive" persons of interests within the named categories of "life, liberty, or property" – categories that are "not infinite." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570 (1972).

The Fourteenth Amendment did reorder the relationship of the federal and state governments in fundamental respects, but it did not displace state law as a residual protector of many interests the Fourteenth Amendment did not enumerate. Holdings that would "mandat[e] judicial oversight of communications between and among government employees and their superiors in the course of official business" can lead to "permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and separation of powers." *Garcetti v. Ceballos*, __ U.S. __, 126 S. Ct. 1951, 1961 (2006). In light of the amendment's text and the federal structure, the Supreme Court has held that loss of reputation, government employment, and diminished professional prospects rise to the level of Fourteenth Amendment deprivations only under limited conditions that the majority disregards.

To begin with, it is undisputed that as a probationary employee the plaintiff has no Fourteenth Amendment property interest in a government job itself. As a result, all agree, he had neither a right to a hearing before the termination of his employment nor a right to know the reasons for his dismissal. *Bishop*, 426 U.S. at 348. The loss of a government job and a filed record detailing the reasons for that loss are obviously no small matter. But the Constitution cannot possibly remedy every wrong experienced in life or for that matter every wrong experienced at the hand of some public entity. So the question must be where constitutional law properly leaves off and where statutory and common law remedies kick in. The question must be asked: the Fourteenth Amendment

cannot be read to displace state remedial mechanisms by rendering the Constitution "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976).

While it is constitutionally safeguarded in some instances, "reputation" is neither listed nor enumerated in the Fourteenth Amendment as a protected interest or right. There is no basis to elevate reputational harm above others into a constitutional interest because "[t]he words 'liberty' and 'property' as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law." *Id.* A claim based upon stigmatizing government statements can therefore arise neither alone nor in the abstract. Rather, because reputation is indistinguishable from a multitude of personal, dignitary, and proprietary interests that state courts and legislatures may deem worthy of protection, the cases establish that neither the harms from the loss of at-will employment nor the harms from stigmatizing information rise by themselves to the level of constitutional harm. *Id.*; *Roth*, 408 U.S. at 575. It is only when termination is combined with stigmatizing disclosures that the resulting harm is of constitutional magnitude.[11]

The majority's conception of Fourteenth Amendment deprivation is as flawed as its discussion of Fourteenth

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[11] The majority contends that a failure to adopt its likelihood standard would strip the Due Process Clause of its historic function in providing pre-deprivation hearings. Maj. Op. 14-15 n.9. A pre-deprivation hearing, however, is mandated only when a public entity is proposing to deprive an individual of a constitutionally protected right or interest, and, even in such circumstances, a pre-deprivation hearing may not always be required. *See, e.g.*, *Parratt v. Taylor*, 451 U.S. 527, 540-41 (1981). Here, the City of Newport News is not proposing such an action, and it is improper to subject a public entity to suit purely on the basis of a record-keeping function.

Amendment interests. The plaintiff has not yet been deprived of an interest in his reputation, because the reasons for his dismissal evidently remain in a government file. Moreover, the liberty "to engage in any of the common occupations of life" posited in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), has not been infringed where the employer has neither made any information public nor shared information with a future employer. In short, the plaintiff has suffered no deprivation of reputation or of his ability to pursue other jobs.

The majority nevertheless holds that the Constitution can be violated if it finds "a likelihood" of future disclosure and reputational harm. Maj. Op. at 10. The Constitution does not give courts the power to predict future harms and declare the Constitution violated before the possible harms transpire. The text makes it actionable for states to "deprive" a person of "life, liberty, or property," but not to create a "likelihood" of such a deprivation. Whether the majority addresses Fourteenth Amendment "interests" or "deprivations," it has done violence to our constitutional text and reordered our constitutional structure. The upshot is to federalize myriad aspects of the local employment relationship without any pretense of democratic sanction.

B.

If there was room for doubt about this matter, the Supreme Court eliminated it in *Bishop v. Wood*, 426 U.S. 341 (1976). *Bishop* directly took up the question of when allegations of employee misconduct in connection with a termination implicate a Fourteenth Amendment interest. The plaintiff alleged that a police department deprived him of liberty when it terminated his employment and provided him with false and stigmatizing reasons for his discharge that might "severely damage his reputation in the community." *Id.* at 347. The Supreme Court found that in the absence of disclosure, the employer had caused no constitutional harm. Since the explanation of the plaintiff's discharge "was not

made public" before the plaintiff disclosed the allegations through his own lawsuit, the Court wrote that the explanation "cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honor, or integrity' was thereby impaired." *Id.* at 348 (emphasis added; footnote omitted). The Fourteenth Amendment was not implicated, the Court concluded, by "the discharge of a public employee whose position is terminable at the will of the employer *when there is no public disclosure of the reasons for the discharge.*" *Id.* (emphasis added). To like effect is *Codd v. Velger*, which summarized the cases on constitutionally mandated hearings by noting, "Only if the employer *creates and disseminates* a false and defamatory impression about the employee in connection with his termination is such a hearing required." 429 U.S. 624, 628 (1977) (emphasis added).

The majority acknowledges the binding precedent on this matter, as it must, but seems inexplicably puzzled by the Supreme Court's plain language. The Supreme Court has used the words "made public" and "public disclosure" to describe the threshold of constitutional harm, but the majority writes that *Bishop* did not "resolve the question" of what a plaintiff must allege to meet this requirement. Maj. Op. at 7; *see also* Maj. Op. at 8. This observation wishes for ambiguity where there is none. To "make public" means "to cause to become known generally" just as "disclosure" entails "exposure" or "revelation," and the majority cites no alternative definition or use that calls into doubt the meanings familiar to school children. *The Random House Dictionary of the English Language* 562, 1562-63 (2d ed. 1987). As the Seventh Circuit has written, adopting a "likelihood of disclosure" standard for liability based upon stigmatizing personnel records requires "[d]efining 'public disclosure' in a way which encompasses 'no public disclosure'" – "an exercise we choose not to embrace." *Martin*, 943 F.2d at 17.

Perhaps in recognition of these problems, the majority casts about for other possible injuries on which it can hang judicial intervention, seizing upon a potential indirect consequence of virtually any employee's termination. It writes that a former employee might fear that prospective employers would make inquiries about his past job performance and might limit his job search as a result. *See* Maj. Op. at 9. Although these possible chilling effects are the only harm that a plaintiff could be said to have suffered from a letter in a file, my colleagues would evidently not require a plaintiff to plead or prove that he suffered even this indirect injury.

Moreover, this attenuated consequence cannot rise to the level of a constitutional deprivation, because injuries that are more serious and direct do not warrant constitutionalization. *Roth*, *Bishop*, and *Paul* did not reject Fourteenth Amendment claims because of blindness to the negative professional or reputational consequences that might flow from employees' terminations or the records pertaining to them – the cases explicitly recognized such consequences. *See Roth*, 408 U.S. at 574 n.13; *Paul*, 424 U.S. at 701. They nevertheless refused to find a constitutional interest because the text and structure of the Fourteenth Amendment set too high a bar.

III.

A.

Even if judges were somehow set free to prescribe policy unconstrained by text or precedent, a lively debate might ensue over whether the majority view is suitably wise. My friends make a case that it is, but as with most matters of policy, there exist two sides.

First, slighting the principle that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," *Bishop*, 426 U.S. at 349 (footnote omitted), widens the gap between public and private employees. The

majority observes that a former government employee who feared the release of stigmatizing allegations might feel obligated to "choose between finding future employment and protecting his reputation by not applying for jobs." Maj. Op. at 9.

That is all well and good, but these are the precise harms that every person terminated from employment may experience. While the prohibitions on state action in the Fourteenth Amendment will always necessitate some differences in treatment between public and private employees, the majority's standard as to likelihood of harms drives a wedge between these two groups of workers to an extent that many lawmakers might find both divisive and unpalatable. Whether widening the gap in our country between private and public employees is desirable is at least an arguable point, as is whether the majority's approach leaves two groups with very different remedies for comparable harms without compelling reason.

Second, the broad power that the majority claims over personnel matters invades an area in which state and local officials are often better equipped than judges to make decisions. Whether benefits of accuracy and fairness justify the costs of particular procedural safeguards is not a question that can be answered in the abstract and for all time. Leaving the analysis to democratically responsive local authorities where the Constitution's text does not permit judicial involvement makes it possible to strike balances suited to local needs and facilitates adaptation to changing circumstances and new insights.

For example, in permitting liability based upon a letter in a personnel file, the majority may make government processes less fair and more arbitrary by "penaliz[ing] forthright and truthful communication between employer and employee." *Bishop*, 426 U.S. at 349. The majority makes it costlier to institute systems of progressive discipline that require documentation of misdeeds and take into account

past conduct in imposing penalties, even though such systems may benefit both employers and employees. Furthermore, if a government employee is terminated, he may ask for a reason and his employer may consider it to be in the interests of fairness to provide an explanation even when there is no legal obligation to do so. But when courts open governments to liability because they provide such reasons, government employers may simply stop giving them: "where there was no constitutional requirement for the state to do anything," Judge Friendly has written, "the state would merely opt to give no reasons and the employee would lose the benefit of knowing what might profit him in the future." *Russell v. Hodges*, 470 F.2d 212, 217 (2d Cir. 1972). Tenured employees, of course, are entitled not simply to know the reasons for their dismissal but to challenge them through hearings, *see, e.g.*, *Roth*, 408 U.S. at 576-77, and it seems anomalous to require the provision of reasons to tenured employees while discouraging the provision of reasons to untenured ones.

Even with respect to untenured employees, some acts of documentation may not be wholly voluntary, and as a result, the majority's new threat of liability may place governments between a rock and a hard place. Procedural and substantive limits on employee discipline are common subjects of collective bargaining, and union agreements may therefore require documentation of the reasons for dismissals. *See* Ann C. Hodges, *The Interplay of Civil Service Law and Collective Bargaining Law in Public Sector Employee Discipline Cases*, 32 B.C. L. Rev. 95, 104-07 (1990). Governments may also record these reasons in order to defend themselves in the event that a former employee claims a dismissal was based upon race, sex, or some other impermissible consideration. Under Title VII of the Civil Rights Act of 1964, for example, once an employee presents a prima facie case of unlawful discrimination – a showing that is "not onerous" to make – the defendant "must clearly set forth, through the introduction of admissible evidence"

the "legitimate, nondiscriminatory reason" for its challenged action. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-55 (1981). This leaves governments with little choice but to document the reasons for major personnel actions, and it is odd, to say the least, to make such records necessary and in the next breath open governments up to liability on the basis of the same documents.

B.

The practical problems with the majority's approach do not end there. It is no answer to say state and local governments need only avoid constitutional infractions to avoid being found in violation of the Fourteenth Amendment because under the majority's vague standard, this is more easily said than done. The majority imposes an amorphous overlay upon an area of the law where balancing tests already leave state and local governments uncertain about the nature of their obligations. Government employers already face a difficult predictive calculus in establishing procedures to govern actions that indisputably deprive citizens of liberty or property, since the procedures required depend upon judicial balancing of:

> [f]irst, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

The standard of liability is vague in a second important respect. Employers face additional uncertainty over whether countless personnel documents generated in the course of government operations "imply the existence of serious

character defects," and could therefore implicate a constitutional interest if disclosed. *Robertson v. Rogers*, 679 F.2d 1090, 1092 (4th Cir. 1982). Adverse personnel actions are by definition taken on the basis of unfavorable assessments, and the majority provides little guidance for gauging which of these assessments are sufficiently unflattering to qualify as actionable.

And the majority now adds a third level of uncertainty: Government employers will have to predict whether a court would find a "likelihood" that even confidential documents would be disclosed in the future. This vague standard imposes enormous costs even when government conduct is found to be blameless, because uncertainty over its application will give rise to litigation in the absence of harm.

This case perfectly illustrates the degree to which the majority's standard will put governments at the mercy of litigants no matter how careful the governments' conduct. Newport News must have imagined it would not be drawn into court under a likelihood-of-dissemination standard: The city concluded that disclosure of the plaintiff's personnel files would be not merely against its own policies but prohibited by law under all but specified circumstances. Under Virginia's Government Data Collection and Dissemination Practices Act, a government agency may "disseminate only that personal information . . . necessary to accomplish a proper purpose of the agency." Va. Code Ann. § 2.2-3803(1). City policy accordingly forbids disclosure of the reasons for an employee's termination except when failure to disclose the reasons to a requesting government agency could place the requestor in a high liability situation. Indeed, the district court agreed that state law would prohibit disclosure of Sciolino's personnel files. Yet neither of these facts saves the city from litigation – and perhaps liability – under the majority's "likelihood" view. *See* Maj. Op. at 5-6 n.3. It is hard to see how almost any statement will not be fodder for litigation under this approach.

Nor can a city avert litigation by offering generous procedural rights because as this case shows, a plaintiff can still enmesh the government in litigation by alleging that yet more safeguards are required. In this case, before Police Chief Mook dismissed Sciolino from his probationary position and wrote him a letter documenting findings of misconduct, Mook met with Sciolino to explain the charges and offer the opportunity to respond. Although the majority concedes that the meeting "may have afforded Sciolino all the process to which he would be due," it keeps the city in court in order to keep its own options open, writing that "[t]he record in this case is not sufficiently developed" to assess the adequacy of the procedural safeguards "at this early stage." *See* Maj. Op. at 4 n.1. As this case illustrates, there is little that state and local governments will be able to do to avoid litigation over even merit-less claims under the unascertainable standards the majority imposes.

Finally, it bears repetition that this whole area reflects a tension between two competing and legitimate interests. On the one hand, there is the interest of the employee in avoiding any negative consequences from stigmatizing accounts of his job performance. On the other, there is the employer's interest in documenting serious employee misconduct and in holding open the prospect of honest and accurate communications between employers about prospective hires who have serious character defects or have even engaged in criminal misdeeds. Where there has been a deprivation of a constitutional interest, *Mathews* requires that courts strike the balance between these considerations. Where, as here, there has been no loss of reputation and indeed no deprivation of any interest rising to constitutional magnitude, legislatures and state governments remain free to balance the employee's interests against the need for maintaining records that will facilitate accurate decision-making. Where the most the public employer has done is put a letter in a file, the balancing of the interests falls to legislatures and not to the courts.

C.

My colleagues evidently impose this vague and burdensome standard for constitutional liability because they are troubled that if municipal liability could arise only if allegations were disseminated, courts would be restricted in their ability to rework government procedures until after reputational harm occurred. The majority finds this limitation too great to countenance: "If an allegation of actual dissemination were required, the information would have already been communicated to a potential employer, the employee's job opportunities foreclosed, and his reputation damaged *before* any possibility for a [judicially ordered] name-clearing hearing." Maj. Op. at 10. In addition, a former employee might have to seek discovery in order to be certain that he had a cause of action, because he might not know before filing suit whether personnel information had been communicated to members of the public. Maj. Op. at 10.

This reasoning is flawed in several ways. It utilizes a dangerous and forbidden mode of judicial interpretation, reasoning from the remedy that judges wish to provide back to the creation of a constitutional wrong. This transforms the Due Process Clause from a protection of a named set of rights into a roving commission to rework state and local governments in the manner that judges deem optimal by finding "rights" when necessary. The Supreme Court has confronted and rejected this judicial approach, writing repeatedly that under the Due Process Clause, "The categories of substance and procedure are distinct." *See Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 541 (1985). The first step in a due process inquiry must be to determine "whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment," with courts proceeding to assess the adequacy of process only if so. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see also Loudermill*, 470 U.S. at 541.

Roth unambiguously rejected a remedy-first approach, finding that a district court erred when it engaged in such reasoning. *See* 408 U.S. at 569-71.

Moreover, the limitation on judicial power that the majority finds so troubling is a premise of our constitutional system that has served us well for centuries. The majority writes as though it would be remarkable and regrettable that the plaintiff would have to wait until he suffered reputational harm before claiming that his constitutional rights had been violated, but under the conception of the judicial role embedded in our Constitution, a case must involve actual or imminent injury to even be justiciable. *Compare* Maj. Op. at 9 ("Requiring a plaintiff to wait until he actually loses some job opportunities would place him between the devil and the deep blue sea") (internal quotations omitted) *with, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) ("The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical.") (internal quotations omitted). I am not certain that even the requirements of standing are satisfied in this case: A plaintiff may have a cause of action based upon a "likelihood" of future disclosure under the majority's theory, even if the plaintiff is not in immediate danger of reputational harm or other constitutionally cognizable injury.[12] Proceedings in the absence of injury exceed our judicial authority and add unnecessary litigation costs to state and local government budgets.

Nor is it at all remarkable or unique that a potential plaintiff may not have all facts surrounding a possible violation of his constitutional rights before filing suit. While the majority evidently finds unacceptable the Supreme

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[12] The plaintiff's dismissal itself cannot be the source of his claimed injury because it is undisputed that an untenured probationary employee has no constitutional interest in his government job. *See supra* at 19.

Court's requirement that statements be "made public" in order to give rise to liability because it believes that this requirement makes due process protections "virtually impossible to enforce," *see* Maj. Op. at 10, plaintiffs often do not have all the knowledge necessary to prove their causes of action before filing suit. If they did, there would be no need for the many provisions in the Federal Rules governing the conduct of discovery. *See, e.g.*, Fed. R. Civ. P. 11(b)(3), 26-37. The majority's standard would not obviate the need for this discovery. To the contrary, plaintiffs will be required to undertake more extensive discovery and seek the testimony of a greater array of officials now that their cases turn not upon the simple question of whether files have been released but upon the speculative question of whether there exists a likelihood that they would be at some time in the future.

The majority need not fear that state and local governments will run riot in the absence of its novel constitutional doctrine. The elected branches have compelling reasons to safeguard citizens' reputational interests absent the strong medicine of judicial oversight of their internal workings. They are accountable to constituents and often answerable to public employee unions; indeed, they have been providing mechanisms to vindicate reputational interests through causes of action such as defamation since long before the Constitution was invoked for this purpose. Many governments have added to these protections through civil service systems, which "typically restrict the public employer's discretion to discharge and to impose other serious discipline, such as demotion and suspension," and often allow dismissed employees to challenge the reasons for a dismissal through an appeals process. *Hodges*, *supra*, at 103.

Indeed, a government's own effective functioning is served by procedures to ensure that employee morale remains high and that good employees are not lost due to dismissal based upon inaccurate reports. An "actual

dissemination" standard for constitutional liability itself creates incentives to institute procedural protections before the fact. Even when government actors have not made personnel reports public, agencies that wish to reserve the right to disseminate in the future would be well advised to hold hearings when all parties relevant to allegations of misconduct are available and their memories are fresh. Under an actual dissemination standard, however, the judgment about future likelihood would be reserved to the actor most capable of making it – the entity that might disseminate the allegedly stigmatizing statements – and courts would not be drawn into wholly hypothetical disputes about the precise level of name-clearing process required in light of the injurious effects of disclosures that may never occur.[13]

IV.

The Due Process Clause preserves essential freedoms, but it may also tempt judges to overrun their role in order to impose their own conceptions of justice on state and local governments. There is room for constitutional standards in this area, as the Supreme Court has made clear. But placing states and localities at constitutional risk for performing record-keeping functions goes much too far. By over-constitutionalizing public employee relationships, as the majority does here, courts diminish the role of all the other

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[13] Even under the majority's likelihood-of-dissemination standard, I would affirm the disposition below. Once judgment had issued, the district court did not abuse its discretion in denying the plaintiff's motions under Rule 59(e) and Rule 15(a) to reopen his case and to amend his complaint for a second time. While amendment is permitted when, prior to discovery, a plaintiff "merely adds an additional theory of recovery to the facts already pled," *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006) (en banc), or when we overrule a precedent that governed the plaintiff's claim at the time of filing, *id.* at 428, neither circumstance is present here. The district court therefore did not abuse its discretion by giving weight to the interests of finality shared by the defendants and the judicial system itself.

participants in this field and assume that neither employers, nor employees and their representatives, nor state law rights and remedies can fairly be trusted to reach just resolutions. The Supreme Court has sought to avoid the danger of over-constitutionalizing in its own procedural due process cases. When *Roth* rejected a professor's claim that he should be provided a hearing to contest his termination, the Supreme Court explained,

> Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for non-retention would, or would not, be appropriate or wise in public colleges and universities. For it is a written Constitution that we apply. Our role is confined to interpretation of that Constitution.

408 U.S. at 578-79 (footnoted omitted).

The majority fails to heed those words. It creates a nebulous new right whose contours assure nothing but the presence of continued litigation and the permanence of judicial oversight. Such are the costs of neglect of text and structure. Whether the majority's views are wise I am content to leave to others, but for reasons stated, I would affirm the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

CHRISTOPHER A. SCIOLINO,

Plaintiff,

v.

FILED
NOV - 1 2004
CLERK, U.S.
DISTRICT COURT
NORFOLK, VA

CIVIL ACTION NO. 4:04cv68

CITY OF NEWPORT NEWS,

and

DENNIS A. MOOK, Individually
and as Chief of Police for the City of Newport News,

Defendants.

MEMORANDUM OPINION & ORDER

Before the Court are the Motions of Defendants City of Newport News ("Newport News") and Dennis A. Mook, Chief of Police ("Chief Mook") (collectively "Defendants") to Dismiss. Specifically, Defendants ask the Court to Dismiss the Amended Complaint of Christopher A. Sciolino ("Plaintiff") pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The Court has considered the memoranda of the parties and these motions are now ripe for decision. For the reasons set forth below, Defendants' Motions to Dismiss are **GRANTED**.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff was employed as a police officer by the Newport News Police Department ("NNPD") from May 2002 until September 26, 2003. (Pl. Am. Compl. ¶ 1.) Plaintiff's term of employment was part of an 18-month probation period which would have ended in October of

2003. (Pl. Am. Compl. ¶ 5.) During the probation period, Plaintiff was not entitled to any grievance rights or procedures under the laws of Newport News or Virginia. (Pl. Am. Compl. ¶ 6.) On June 26, 2003, Carl D. Burt, the Acting Chief of Police, placed Plaintiff on administrative duty pending an investigation into allegations that he had tampered with the odometer of a police vehicle. (Pl. Am. Compl. ¶ 7.) Specifically, Plaintiff was accused of advancing the odometer on Vehicle 816 approximately 10,000 miles. (Pl. Am. Compl. ¶ 7.) Plaintiff denied the allegations. (Pl. Am. Compl. ¶ 7.) On September 26, 2003, Chief Mook, acting on behalf of the NNPD, terminated Plaintiff's employment by letter, accusing Plaintiff of deliberate destruction of city property. (Pl. Am. Compl. ¶ 8.) This letter was circulated to a number of authorized individuals within the NNPD and the City Attorney, and was placed in Plaintiff's personnel file. (Pl. Am. Compl. ¶ 8.) Plaintiff alleges this file amy be made available to prospective employers and the public at large. (Pl. Am. Compl. ¶ 8.)

On June 2, 2004, Plaintiff filed a Complaint alleging that Defendants terminated Plaintiff's employment on the basis of false allegations that impugned his good name, honor, reputation, and integrity, without affording him a hearing, and in doing so denied Plaintiff his constitutional right to due process under the Fourteenth Amendment of the United States Constitution. (Pl. Compl. ¶ 11.) On June 30, 2004, Newport News filed a Motion to Dismiss and a Memorandum in Support. On July 1, 2004, Chief Mook filed a Motion to Dismiss and a Memorandum in Support. In response, on July 7, 2004, Plaintiff submitted his Memorandum in Opposition to the Defendants' Motions to Dismiss and filed an Amended Complaint. On July 12, 2004, Defendants filed their Rebuttal Briefs.

On July 19, 2004, Newport News filed a Motion to Dismiss Plaintiff's Amended Complaint and Memorandum

in Support. On July 20, 2004, Chief Mook filed his Motion to Dismiss Plaintiff's Amended Complaint and Memorandum in Support. On July 30, 2004, Plaintiff responded to both Motions to Dismiss. On August 9, 2004, Defendants filed their Rebuttal Briefs. This matter is now ripe for determination by the Court.

II. LEGAL STANDARDS

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of actions that fail to state a claim upon which relief can be granted. Although courts may only rely upon the complaint's allegations and those documents attached as exhibits or incorporated by reference, *Simons v. Montgomery County Police Officers*, 762 F.2d 30, 31 (4th Cir. 1985), courts will favorably construe the allegations of the complainant. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Courts must assume that the facts alleged in the plaintiff's complaint are true. *McNair v. Lend Lease Trucks, Inc.*, 95 F.3d 325, 327 (4th Cir. 1996). A court will only grant a motion to dismiss if "it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." *Adams v. Bain*, 697 F.2d 1213, 1216 (4th Cir. 1982) (quoting *Johnson v. Mueller*, 415 F.2d 354, 355 (4th Cir. 1969)). A plaintiff's misconception or mislabeling of the proper legal theory of the claim is not grounds for dismissal; a court must look to any legal theory supported by the facts alleged, so long as the plaintiff's complaint gives fair notice of the claim and the grounds upon which it rests. *Williams v. New Castle County*, 970 F.2d 1260, 1265-66 (3d Cir. 1992); *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 787 (8th Cir. 1979); *Sessions v. Chrysler Corp.*, 517 F.2d 759, 760-61 (9th Cir. 1975); *Dostchay v. Nat'l Mut. Ins. Co.*, 246 F.2d 221, 223 (5th Cir. 1957); *Simmons v. Cmty. Serv. Providers, Inc.*, 847 F.Supp. 351, 352-53 (E.D. Pa. 1994).

III. DISCUSSION

In this case, Plaintiff alleges he was denied due process under the Fourteenth Amendment to the United States Constitution. Specifically, Plaintiff alleges that he was deprived of his liberty to engage in other employment opportunities without a hearing to give him an opportunity to clear his name.

To claim the protection of the due process clause, an individual must show that some state action has deprived him of some constitutionally protected liberty or property interest. *Johnson v. Morris*, 903 F.2d 996, 999 (4th Cir. 1990). "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential." *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 573 (1972). A person is entitled to such a hearing to have an opportunity to clear his name. *Id.* at 573 n.12. The United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") has "recognized that a liberty interest is implicated by the public announcement of reasons for an employee's discharge." *Johnson*, 903 F.2d at 999 (citing *Boston v. Webb*, 783 F.2d 1163, 1166 (4th Cir. 1986)). The liberty interest is the interest of being free from "arbitrary restrictions" on the individual's ability to obtain "other gainful employment" because of the information published by the public employer in regards to the lawful termination of an at-will public employee. *Johnson*, 903 F.2d at 999. Harm to an individual's reputation alone is not sufficient to support a deprivation of liberty claim under the Fourteenth Amendment; there must be some damage to the individual's ability to seek further employment. *Id.* (citing *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

To prove that Defendants deprived Plaintiff of a liberty interest, Plaintiff must show (1) that the charges made against him "imposed on him a stigma or other disability" that prevented him from engaging in other employment, (2)

that the charges were made public by his employer, (3) that the charges were made in conjunction with a termination or significant demotion, and (4) that the charges were false. *Stone v. University of Md. Med. Sys. Corp.*, 855 F.2d 167, 173 n.5 (4th Cir. 1988) (citing *Board of Regents*, 408 U.S. at 573-75, *Bishop v. Wood*, 426 U.S. 341, 348-49 (1976), *Codd v. Velger*, 429 U.S. 624, 627 (1977), and *Paul*, 424 U.S. at 710-11). "To implicate a constitutionally protected liberty interest, defamatory statements must at least 'imply the existence of serious character defects such as dishonesty or immorality.'" *Zepp v. Rehrmann*, 79 F.3d 381, 388 (4th Cir. 1996) (quoting *Board of Regents*, 408 U.S. at 573).

Plaintiff clearly satisfies elements three and four for the purposes of a motion to dismiss. Plaintiff contends that the charges against him were false, and neither party disputes that Plaintiff was terminated because of the charges. The larger question here is whether the charges have been made public.

There is no question that the mere presence of defamatory information in one's personnel file is not sufficient to establish a violation of one's liberty interests. The United States Supreme Court has held that there must be "public disclosure" of the reasons for the discharge; that the reasons must be "made public." *Bishop v. Wood*, 426 U.S. 341, 348 (1976). However, there is some dispute over what activity constitutes information being "made public."[1] The Circuit Courts of Appeals appear to be split upon whether actual dissemination of material in a personnel file must occur before it is considered "made public," or whether the mere filing of material in such a way that it is likely that the

[1] The Court notes that in Defendants' analysis of the case law, Defendants consistently equate the use by courts of the phrases "public disclosure" and "made public" with an actual instance of exposure to some member of the public. As this paragraph will explain, these usages are not synonymous, much as "publication" is more broadly defined in the context of defamation than it is in common usage.

material could be disseminated is sufficient to consider something "made public"; the majority of the Circuits that have ruled on the matter have adopted the "likelihood of dissemination" standard, with only the Seventh Circuit expressly adopting the "actual dissemination" approach. *Compare Leonard v. District of Columbia*, 794 A.2d 618, 628-29 (D.C. Cir. 2002) (agreeing with the Second Circuit that if charges in a personnel file are likely to be disclosed to prospective employers, then public disclosure is satisfied), *Buxton v. Plant City*, 871 F.2d 1037, 1045 (11th Cir. 1989) (holding that because state statute required that plaintiff's personnel file be made part of the public record, the charges within it became published at time of filing), *Brandt v. Board of Coop. Educ. Svcs.*, 820 F.2d 41, 45 (2d Cir. 1987) (holding that the presence of charges in plaintiff's personnel file would satisfy the public disclosure requirement if prospective employers were likely to gain access to it), *Hogue v. Clinton*, 791 F.2d 1318, 1323 n.7 (8th Cir. 1986) (noting that charges in a personnel file may be sufficient publication if the file is made available to prospective employers), *Bailey v. Kirk*, 777 F.2d 567, 580 n.18 (10th Cir. 1985) (noting that defamatory information in a personnel file is published if it is not restricted for internal use), *and Burris v. Willis Indep. Sch. Dist., Inc.*, 713 F.2d 1087, 1092 (5th Cir. 1983) (holding that the mere presence of defamatory information in a personnel file does not constitute publication unless there is a possibility the information will not be kept confidential), *with Johnson v. Martin*, 943 F.2d 15, 16-17 (7th Cir. 1991) (expressly disagreeing with the Second Circuit in *Brandt* and finding that defamatory statements must actually be disseminated before there is an injury), *with Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 74-75 (1st Cir. 1990) (holding that mere presence of defamatory memorandum in personnel file when parties *stipulated* that it was not otherwise publicized is not sufficient to prove publication, but not addressing the "likelihood of dissemination" issue), *and Copeland v.*

Philadelphia Police Dep't., 840 F.2d 1139, 1148 (3d Cir. 1988) (holding that the mere presence of defamatory information in personnel file and subsequent inability to find a job is not sufficient to prove publication, but not addressing the "likelihood of dissemination" issue), *with Llamas v. Butte Cmty. Coll. Dist.*, 80 Empl. Prac. Dec. (CCH) ¶ 40,547 (9th Cir. 2001) (citing *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1179 n.10 (9th Cir. 1998) (acknowledging circuit split on this issue but declining to address it).

In this case, the parties come to differing conclusions on the Fourth Circuit's precedent on this question. The parties focus their attention on *Ledford v. Delancey*, 612 F.2d 883 (4th Cir. 1980). In *Ledford*, the Fourth Circuit stated:

> We do think, however, that plaintiff does have a protected right with respect to the contents of his personnel file when that file *may* be the subject of inspection by prospective employers. *Here* one may fairly infer that plaintiff has alleged that certain false information *has been circulated* and will continue to be circulated to prospective employers. . . . Plaintiff has a right that his personnel file contain no substantially false information with respect to his work performance or the reasons for his discharge when that information is *available* to prospective employers.

Id. at 886-87 (emphases added). Admittedly, it is not precisely clear from the language in this paragraph whether the Fourth Circuit adheres to the "actual dissemination" standard or the "likelihood of dissemination" standard. On the one hand, the *Ledford* Court specifically noted that in the case before it, the plaintiff alleged actual and continuing dissemination. *Id.* On the other hand, the language which couches this specific reference speaks more broadly of information that "may be the subject of inspection" and "when that information is available." *Id.* The Court next

turns to the cases the *Ledford* Court cited as being consistent with its own approach. *Id.* at 887 n.1.

Four of the cases the *Ledford* Court cited support the "likelihood of dissemination" standard. *See Walker v. Alexander*, 569 F.2d 291, 294-95 (5th Cir. 1978) (quoting with approval *Ortwein v. Mackey*, 511 F.2d 696, 699 (5th Cir. 1975) that "infringement of one's liberty interest can be found only where the governmental agency has made *or is likely to make* the allegedly stigmatizing charges public 'in any official or intentional manner'" (emphasis added)); *Clark v. Mann*, 562 F.2d 1104, 1116 (8th Cir. 1977) ("Where derogatory reasons for nonrenewal are incorporated into a record made available to a prospective employer or are publicly announced, [plaintiffs] may be said to have been deprived of an interest in liberty. . . . The record does not establish that derogatory reasons underlying plaintiffs' terminations were incorporated into *any record which would be available* to prospective employers and which could thus damage their chances for future employment." (emphasis added)); *Mazaleski v. Treusdell*, 562 F.2d 701, 712 (D.C. Cir. 1977) ("[W]here the government publicly disseminates information concerning its adverse personnel actions, or *where it simply makes certain information available* to prospective employers, a court must proceed to determine whether the information disclosed is of such a derogatory nature as to infringe a liberty interest of the employee." (emphasis added)); *Velger v. Cawley*, 525 F.2d 334, 336-37 (2d. Cir. 1975) ("[T]he manner in which personnel records are made available to inquiring public and private employers insures that serious derogatory information in the file will stigmatize the dischargee," where the public employer generally allows all inquiries to see personnel files be permitted with permission of the dischargee), *rev'd on other grounds sub nom. Codd v. Velger*, 429 U.S. 624 (1977). Two of the cases merely restate the holding of *Bishop* and its descendants that there must be some type of publication, and do not address the specific issue of what constitutes

publication. *See Sullivan v. Brown*, 544 F.2d 279, 283 & n.3 (6th Cir. 1976) (noting that defamation alone is not enough to establish a violation of one's liberty interest, that there must be a "public disclosure" of the defamation, but ultimately finding that no liberty was violated because plaintiff was transferred, not terminated); *Dennis v. S & S Consol. Rural High School Dist.*, 577 F.2d 338, 343 (5th Cir. 1978) (noting that there must be a public airing of stigmatizing allegations for there to be a violation of one's liberty interests, in reference to public statements by an employer, but not addressing any information in plaintiff's personnel file). Only one case in the string of citations can be construed as supporting the "actual dissemination" standard. *See Ventetuolo v. Burke*, 596 F.2d 476, 483 (1st Cir. 1979) (Distinguishing the case before it from *Velgar* on the grounds that there was no actual disclosure of information in the appellant's personnel file, but relying ultimately on the fact that the charges were so minor as to be inconsequential and that appellant had been reinstated).

The Defendants would have the Court ignore as dictum everything in the excerpted paragraph from *Ledford* but the one sentence that favors Defendants' interpretation of the law. The Court is sympathetic to Defendants' argument that the Fourth Circuit may not have fully and adequately considered the question directly at issue before this Court. The lack of clear uniformity in the opinions the *Ledford* Court cited as consistent with its own findings indicates that the Fourth Circuit may not have fully and adequately considered the question directly at issue before this Court. The lack of clear uniformity in the opinions the *Ledford* Court cited as consistent with its own findings indicates that the Fourth Circuit may not have intended to reach the question of whether there had to be "actual dissemination" of materials in a personnel file, but may merely have been affirming that those materials had to be made public. That said, the Court cannot adopt the interpretation Defendants urge upon the Court. To do so would be to find that the

Ledford Court reached the question at issue in this case, and answered it *in favor* of the "actual dissemination" standard. The Court finds that no fair reading of *Ledford* can support such a finding. While the paragraph in question may indicate that the Fourth Circuit did not reach the question before this Court, the analysis undertaken in the paragraph was clearly integral to the question before the *Ledford* Court, and this Court will not discard portions of that paragraph as dictum.

Despite the fact that the *Ledford* Court does not appear to have reached the question, the language of the *Ledford* opinion, and the weight of the cases relied upon therein, leads the Court to believe that the "likelihood of dissemination" standard applies in the Fourth Circuit. The majority of the Circuit Courts of Appeals which have ruled on the matter have applied this "likelihood of dissemination" standard. *See* discussion *supra* pp. 6-7. The progeny of the opinions the *Ledford* Court relied upon have gone on to adopt the "likelihood of dissemination" standard. [2] Additionally, in another context, the Fourth Circuit has held that no liberty interest is violated when confidentiality laws protect information in a file maintained by a county department of social services. *Hodge v. Jones*, 31 F.3d 157, 165 (4th Cir. 1994). If the "actual dissemination" standard applied, the *Hodge* Court might simply have held that no actual dissemination had occurred. Instead, the *Hodge* Court relied upon the fact that it was highly unlikely that the information would be disseminated. *Id.* For the reasons set forth above, the Court finds that public disclosure of defamatory information occurs when that information is placed in a personnel file that is likely to be available to prospective employers.

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[2] At least as far as those Circuits have addressed the question – the Court notes again that the First and Sixth Circuits do not appear to have reached an opinion on the issue. *See* discussion *supra* pp. 6-7.

To the extent the Court finds that Plaintiff's file is protected by confidentiality provisions, there is no likelihood of dissemination, and no constitutional violation can occur. *Hodge v. Jones*, 31 F.3d 157, 165 (4th Cir. 1994). The Commonwealth of Virginia has adopted the Government Data Collection and Dissemination Practices Act ("GDCDPA"), VA. CODE ANN. §§ 2.2-3800 to 2.2.-3809 (West 2004). Personnel records kept by the police are protected by the GDCDPA.[3] *Hinderliter v. Humphries*, 224 Va. 439, 447 (1982). Plaintiff points out that the Virginia Supreme Court has found that "the Act does not render personal information confidential. Indeed, the Act does not generally prohibit the dissemination of information." *Id.* This statement must be taken in the context of the facts of *Hinderliter*, where the plaintiff attempted to bring claims against individuals, several of whom had conveyed or received information from his personnel record with no knowledge of the improper purpose.[4] *See id.* at 445-46. The Virginia Supreme Court held in *Hinderliter* that an individual had not violated the GDCDPA simply by possessing and disseminating the protected information; there had to be some procedural safeguard which that individual had violated. *Id.* Plaintiff appears to argue that

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[3] Although the parties did not raise this issue, the Court notes that personnel records are not subject to requests under the Virginia Freedom of Information Act unless the individual waives this protection in writing. VA. CODE ANN. § 2.2-3705.1 (West 2004). No such waiver has been alleged in this case.

[4] Noe, the county executive, requested a copy of an investigatory report from Officer Hinderliter's file on behalf of Humphries, a member of the board of supervisors overseeing the county police, whom Noe believed was making the request in her official capacity. The police chief turned over the report to Noe, who gave it to Humphries, who left it where her daughter could find. Humphries' daughter was involved in the incident at issue in the investigatory report, and the daughter took the report, and shared it with her attorney and one of the other individuals involved in the incident. The *Hinderliter* Court found that only Humphries had violated the GDCDPA, because she was the only person who violated the procedural requirements for dissemination.

this procedural bar to dissemination is insignificant, and contributes little or nothing to the Court's analysis of whether it is likely that information in an officer's personnel record will be made available to prospective employers. The Court disagrees. It is clear that the GDCDPA allows dissemination of protected information only when "necessary to accomplish a proper purpose of the agency." *Hinderliter*, 224 Va. at 448. There is also a presumption that public officials will obey the law. *Id.* Therefore, the question which remains is whether releasing information from a personnel file at the request of a prospective employer is a proper purpose of the NNPD.

Under Virginia law, a local police force "is responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances." VA. CODE. ANN. § 15.2-1704(A) (West 2004). The Court cannot find any case law nor statutory authority in either the Virginia Code or the Code of Ordinances, City of Newport News, Virginia, that would indicate that a proper purpose of the NNPD would be to provide prospective employers with a copy of a letter of termination in a former employee's personnel file. Plaintiff urges the Court to construe this question of likelihood of dissemination as a question of fact, requiring the Court to resolve it in Plaintiff's favor for the purposes of this motion. However, this is clearly a question of law.

The release of the termination letter to a prospective employer would not be within the proper purpose of the NNPD, and therefore such a release would be a violation of the GDCDPA. Plaintiff alleges no facts that would overcome the presumption at law that the public officials of Newport News and the NNPD will follow the law. Plaintiff has not alleged that the letter has been shown to any prospective employer. Nor does Plaintiff allege that there exists a practice of showing such letters to prospective

employers. Plaintiff does not even allege that he has applied for any employment and been denied. At best, Plaintiff alleges that someone in the NNPD *might* at some future point violate the GDCDPA and show his termination letter to some future prospective employer. These speculative claims are not sufficient to overcome the presumption at law that the termination letter will be protected by the GDCDPA, and thus not likely to be disseminated. Because Plaintiff cannot satisfy the publication prong of the test for deprivation of liberty, the Court declines to reach the question of whether the charges in Plaintiff's termination letter imply serious character defects and therefore stigmatize Plaintiff. For these reasons, Plaintiff fails to state a claim upon which relief may be granted. Accordingly, Defendants' motions to dismiss are **GRANTED**.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss are **GRANTED**. Plaintiff's Amended Complaint is **DISMISSED**. Defendant Mook's request for costs, expenses, and attorney's fees is **DENIED**.

The Court **DIRECTS** the Clerk to send a copy of this Order to the parties.

IT IS SO ORDERED.

/s/ Raymond A. Jackson
United States District Judge

Norfolk, Virginia
November 1, 2004

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

FILED
SEP 28 2005
CLERK, U.S.
DISTRICT COURT
NORFOLK, VA

CHRISTOPHER A. SCIOLINO,

Plaintiff,

v. **CIVIL ACTION NO. 4:04cv68**

CITY OF NEWPORT NEWS,

and

DENNIS A. MOOK, Individually and as Chief of Police for the City of Newport News,

Defendants.

MEMORANDUM ORDER

Before the Court are the Motions of Christopher A. Sciolino ("Plaintiff") to Alter Judgment and for Leave to File Amended Complaint. Specifically, Plaintiff seeks to renew his action against Defendants City of Newport News ("Newport News") and Dennis A. Mook, Chief of Police ("Mook") (collectively "Defendants"). Additionally, before the Court is the Motion of Defendant Mook for Leave to File a Sur-Reply. The Court has considered the memoranda of the parties and these motions are now ripe for decision. For the reasons set forth below, Plaintiff's Motion to Alter Judgment and Plaintiff's Motion for Leave to File Amended Complaint are **DENIED**. Defendant Mook's Motion for Leave to File a Sur-Reply is **DENIED**.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff was employed as a police officer by the Newport News Police Department ("NNPD") from May 2002 until September 26, 2003. Plaintiff's term of employment was part of an 18-month probation period which would have ended in October of 2003. During the probation period, Plaintiff was not entitled to any grievance rights or procedures under the laws of Newport News or Virginia. On June 26, 2003, Carl D. Burt, the Acting Chief of Police, placed Plaintiff on administrative duty pending an investigation into allegations that he had tampered with the odometer of a police vehicle. Specifically, Plaintiff was accused of advancing the odometer on Vehicle 816 approximately 10,000 miles. Plaintiff denied the allegations.

On September 26, 2003, Chief Mook acting on behalf of the NNPD, terminated Plaintiff's employment by letter, accusing Plaintiff of deliberate destruction of city property. This letter was circulated to a number of authorized individuals within the NNPD and the City Attorney, and was placed in Plaintiff's personnel file. Plaintiff alleged this file could be made available to prospective employers and the public at large.

On June 2, 2004, Plaintiff filed a Complaint alleging that Defendants terminated Plaintiff's employment on the basis of false allegations that impugned his good name, honor, reputation, and integrity, without affording him a hearing, and in doing so denied Plaintiff his constitutional right to due process under the Fourteenth Amendment of the United States Constitution. (Pl. Compl. ¶ 11.) Defendants filed a Rule 12(b)(6) Motion to Dismiss on the grounds that Plaintiff had failed to state a claim upon which relief could be granted.

The Court granted Defendants' motion to dismiss. To prove that Defendants deprived Plaintiff of a liberty interest, the Court noted that Plaintiff had to show (1) that the charges made against him "imposed on him a stigma or other

disability" that prevented him from engaging in other employment, (2) that the charges were made public by his employer, (3) that the charges were made in conjunction with a termination or significant demotion, and (4) that the charges were false. *Stone v. University of Md. Med. Sys. Corp.*, 885 F.2d 167, 173 n.5 (4th Cir. 1988). The central question for the purposes of the motion to dismiss was whether the charges had been made public.

First, the Court found that public disclosure of defamatory information occurs when that information is placed in a personnel file that is likely to be available to prospective employers. Second, the Court found that Plaintiff's file was protected by confidentiality provisions, and so there was no likelihood of dissemination, and thus no constitutional violation could occur. *Hodge v. Jones*, 31 F.3d 157, 165 (4th Cir. 1994). Because plaintiff had alleged no facts which would overcome the presumption that the Defendants would act in accordance with the confidentiality agreements, the Court found in favor of Defendants, and granted the motion to dismiss on November 1, 2004.

On November 16, 2004, Plaintiff filed a Motion to Alter Judgment pursuant to Rule 59(e). Plaintiff also requested Leave to Amend the Complaint pursuant to Rule 15(a). On December 7, 2004, Defendant Mook requested Leave to File a Sur-Reply Brief seeking to address the issue of the timeliness of his Reply Brief raised by Plaintiff.[1]

II. LEGAL STANDARDS & DISCUSSION

Courts recognize three grounds for amending an earlier judgment: (1) an intervening change in controlling law; (2) the emergence of evidence not previously available; and (3) the correction of a clear error of law or the prevention of manifest injustice. *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). Mere disagreement with a court's application of the law does not support a Rule 59(e) motion.

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[1] These matters were submitted to Chambers for decision in July 2005.

Id. at 1082; *Int'l Longshoremen's Assoc. v. Va. Int'l Terminals*, 932 F. Supp. 761, 762 (E.D. Va. 1996). "Where the motion asserts only an erroneous view of the law, the proper recourse is appeal." *Int'l Longshoremen's Assoc.*, 932 F. Supp. at 762 (citing *Durkin v. Taylor*, 444 F. Supp. 879, 889 (E.D. Va. 1977)).

The Court's Order dismissed Plaintiff's claims for failure to satisfy the publication prong of the test for deprivation of liberty. The Plaintiff was unable to identify any situations in which the termination letter would be shown to prospective employers. In seeking to alter the jugement, Plaintiff now attempts to amend his complaint to allege that situations exist in which his personnel file will be shown to prospective employers. However, Plaintiff does not present any reasons that satisfy the three ground outlined in *Hutchinson*. Plaintiff's motion does not identify an intervening change of law or newly discovered evidence that would justify altering or amending the judgment. Plaintiff also does not argue that there was a clear error of law. Instead, Plaintiff argues that a manifest injustice will occur because he can produce evidence to cure the defect the court found in his complaint. Specifically, Plaintiff would like to amend his complaint to allege that there is a practice of showing personnel letters to prospective employers.

Plaintiff acknowledges that the information now alleged was available before the judgment and that his only reason for failing to allege these specific facts was because he thought it was unnecessary. However, evidence previously available may not later be introduced after judgment. *Sussman v. Salem, Saxon & Nielsen*, 153 F.R.D. 689, 695 (D.C. Fla. 1994); *Johnson v. City of Richmond*, 102 F.R.D. 623, 623 (E.D. Va. 1984) (Rule 59(e) does not provide "a disappointed suitor with a post-judgment opportunity to argue that which could have been argued pre-judgment."). Accordingly, Plaintiff's Motion to Alter Judgment is **DENIED**.

Once a complaint has been dismissed, whether to grant leave to amend is at the discretion of the trial court. *Wallace v. Chrysler Credit Corp.*, 743 F. Supp. 1228, 1236 (W.D. Va. 1990). The purpose of Rule 15(a) is to "provide parties an opportunity to assert new matters that may not have been known to them at the time they filed the original pleadings." *Wallace*, 743 F.Supp. at 1237. Plaintiff has offered no reason for failing to allege these situations in his initial complaint, or for failing to amend his complaint before the entry of judgment. Therefore, Plaintiff's Motion to Amend Complaint is **DENIED**.

The Court finds Defendant Mook's Motion for Leave to File a Sur-Reply Brief irrelevant and the Defendant's request is **DENIED**.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Alter Judgment and Plaintiff's Motion for Leave to File Amended Complaint are **DENIED**. Defendant Mook's Motion for Leave to File Sur-Reply is **DENIED**.

The Court **DIRECTS** the Clerk to send a copy of this Order to the parties.

IT IS SO ORDERED.

/s/ Raymond A. Jackson
United States District Judge

Norfolk, Virginia
September 28, 2005

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 10, 2007

No. 05-2229
CA-04-68-4

CHRISTOPHER A. SCIOLINO,

Plaintiff - Appellant

v.

CITY OF NEWPORT NEWS, VIRGINIA;
DENNIS A. MOOK, Individually and as
Chief of Police for the City of Newport News,

Defendants - Appellees

On Petition for Rehearing En Banc

The appellees' petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Motz, and Judge Gregory.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 11, 2007

No. 05-2229
CA-04-68-4

CHRISTOPHER A. SCIOLINO,

Plaintiff - Appellant

v.

CITY OF NEWPORT NEWS, VIRGINIA;
DENNIS A. MOOK, Individually and as
Chief of Police for the City of Newport News,

Defendants - Appellees

CORRECTED ORDER
On Petition for Rehearing En Banc

The appellees' petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Motz, and Judge Gregory. Judge Motz and Judge Gregory voted to deny panel rehearing, and Judge Wilkinson dissented from the denial of panel rehearing.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

RECEIVED
JUL 07 2004
CLERK, US DISTRICT
COURT
NORFOLK, VA

CHRISTOPHER A. SCIOLINO,
Plaintiff,

v. **Civil Action No:**

CITY OF NEWPORT NEWS,

SERVE: **STUART E. KATZ, ESQ.**
CITY ATTORNEY
2400 WASHINGTON AVENUE
9TH FLOOR, CITY HALL
NEWPORT NEWS, VA 23607

And

DENNIS A. MOOK, Individually and
as Chief of Police for the City of Newport News,
Defendants.

SERVE: **DENNIS A. MOOK**
32 BEVERLY HILLS DRIVE
NEWPORT NEWS, VA 23606

AMENDED COMPLAINT

Plaintiff, Christopher A. Sciolino, by counsel, files an Amended Complaint pursuant to FRCP 15(a) and alleges as follows:

Parties

1. The plaintiff is a citizen of the United States who resides in Newport News, Virginia. The plaintiff was employed as a police officer by the defendant, City of Newport News, from May 2002 until September 26, 2003.

2. At all relevant times, the defendant City of Newport News operated and governed the Newport News Police Department pursuant to the laws of the Commonwealth of Virginia.

Jurisdiction and Venue

3. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. §§ 1983 and 1988.

4. Venue for this action lies in this Court pursuant to 28 U.S.C. § 1391.

Facts

5. In May 2002, the Newport News Police Department hired Mr. Sciolino to serve as a police officer. Mr. Sciolino then began an 18-month probationary period, which would have continued until October 2003.

6. Under both state law and the City of Newport News's grievance procedure, Officer Sciolino was not entitled to any grievance rights while serving in a probationary status.

7. On June 26, 2003, Carl D. Burt, Acting Chief of Police, placed Officer Sciolino on administrative duty pending an investigation into allegations that he had tampered with the odometer of a police vehicle, which would be a crime under state law. Specifically, Officer Sciolino was accused of advancing the odometer on police vehicle 816 approximately 10,000 miles, ostensibly to hasten the vehicle's retirement from service. Mr. Sciolino vigorously denied these allegations.

8. On September 26, 2003, Dennis A. Mook, Chief of Police, acting on behalf of the Newport News Police Department, terminated Officer Sciolino's employment by letter (Ex. 1), accusing him of deliberate destruction of city property. This letter was circulated to various individuals and was made a part of Officer Sciolino's personnel file, which may be available to prospective employers and the public at large.

9. Because Officer Sciolino was a probationary employee, he was denied grievance and other procedural rights, including a hearing. As a result, Officer Sciolino was denied a forum in which he would have had the opportunity to clear his name.

DENIAL OF DUE PROCESS

10. The allegations in paragraphs 1 through 9 are incorporated herein by reference.

11. Defendant's termination of Officer Sciolino's employment under color of state law and on the basis of false allegations that impugned his good name, honor, reputation, and integrity, which were made a part of the public record by the placement of those written allegations into his personnel file, without affording him a hearing, denied him his constitutional right to due process under the Fourteenth Amendment to the United States Constitution.

PLAINTIFF RESPECTFULLY REQUESTS that the Court grant the following relief:

A. Expunge the plaintiff's personnel file on record with the City of Newport News and order the defendants to provide plaintiff with a due process hearing.

B. Award the plaintiff compensation for all lost wages and benefits, compensation for mental anguish and distress, and compensation for injury to his reputation.

C. Award plaintiff punitive damages for defendant's malicious and bad faith violation of plaintiff's due process rights.

D. Award plaintiff his reasonable attorneys' fees, expenses and costs.

E. Grant all other relief, legal or equitable, as the Court deems appropriate.

TRIAL BY JURY IS DEMANDED.

CHRISTOPHER A. SCIOLINO

By: /s/ Reid H. Ervin
Counsel

Reid H. Ervin (VSB 01197)
Thomas A. Dyar (VSB 48249)
Reid H. Ervin & Associates, P.C.
2025 Dominion Tower
999 Waterside Drive
Norfolk, VA 23510
(757) 624-9323

CERTIFICATE

I certify that on July 6, 2004, I mailed by regular United States mail, postage prepaid, a true copy of the foregoing Amended Complaint to:

Allen L. Jackson, Esq.
Office of the City Attorney
2400 Washington Ave.
Newport News, Virginia 23607

Stanley G. Barr, Jr., Esq.
Kaufman & Canoles, P.C.
P.O. Box 3037
Norfolk, VA 23514

/s/ Reid H. Ervin
Reid H. Ervin

NEWPORT NEWS POLICE DEPARTMENT
An Internationally Accredited Agency
Dennis A. Mook, Chief of Police

September 26, 2003

Officer C. A. Sciolino
332 Split Rail Circle, Apt. 202
Newport News, VA 23602

Dear Officer Sciolino:

On September 16, 2003, I met with you in accordance with City Policy to provide you the opportunity to respond to the allegation against you regarding tampering with police unit 0816's odometer. After careful review of this matter, I find your actions constitute a Level III misconduct under Section 1002 of the City of Newport News Personnel Administrative Manual, number 4. Deliberate destruction or reckless use of City Property or the property of others. The prescribed disciplinary action for a Level III Misconduct is dismissal.

You are in your employment probationary period with the City of Newport News. The purpose of the probationary period is to assess whether an employee meets the standards for employment as a police officer. As a result of this misconduct, I find your actions do not meet the standards for a police officer. Your employment as a police officer with the City of Newport News is terminated effective September 26, 2003.

Sincerely,

/s/ Dennis A. Mook
Dennis A. Mook
Chief of Police

DAM/LMP
PC: Assistant Chief of Police
Field Operations Commander

City Attorney
Captain L. A. Mowry
Ms. Lillian Taylor
Internal Affairs

I acknowledge receipt of the original copy of this letter:

_____	/s/ [illegible]
Officer C. A. Sciolino	Witness

refused to sign
[illegible]

EXHIBIT

1

72

(3)

No. 07-159

In the Supreme Court of the United States

CITY OF NEWPORT NEWS, VIRGINIA; DENNIS A. MOOK,

Petitioners,

v.

CHRISTOPHER A. SCIOLINO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

When a public employer fires an employee for false and stigmatizing reasons and is likely to make its accusations known to the former employee's prospective employers, must the former employee wait for actual disclosure to occur in order to invoke his due process right to contest the false allegations?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT 1

A. Proceedings In The District Court 1

B. Proceedings In The Court Of Appeals 3

REASONS FOR DENYING THE PETITION 7

I. THE OVERWHELMING MAJORITY OF FEDERAL COURTS OF APPEALS AGREE THAT ACTUAL DISSEMINATION IS NOT REQUIRED 8

II. PETITIONERS SIGNIFICANTLY OVER-STATE THE BURDENS THE DECISION BELOW WOULD PLACE ON GOVERN-MENTAL EMPLOYERS 15

III. THE FOURTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DUE PROCESS PRECEDENTS 18

A. There Is No "Conflict" Between The Fourth Circuit Decision And *Bishop* v. *Wood* 18

B. Petitioners' Proffered Limitation Is Wrong 20

TABLE OF CONTENTS—Continued

Page

IV. THIS CASE'S INTERLOCUTORY POSTURE AND PRELIMINARY STATUS MAKE REVIEW BOTH UNNECESSARY AND IMPRUDENT 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott Labs. v. *Gardner*,
387 U.S. 136 (1967) 21

Bailey v. *Kirk*,
777 F.2d 567 (10th Cir. 1985) 13

Bishop v. *Wood*,
426 U.S. 341 (1976) ..... *passim*

Board of Regents v. *Roth*,
408 U.S. 564 (1972) ..... *passim*

Brandt v. *Board of Coop. Educ. Servs.*,
820 F.2d 41 (2d Cir. 1987) 9

Brass v. *Incorporated City of Manly*,
No. C02-3004-PAZ, 2003 WL 1907158
(N.D. Iowa Apr. 17, 2003) 14

Burton v. *Town of Littleton*,
426 F.3d 9 (1st Cir. 2005) 9

Buxton v. *Plant City*,
871 F.2d 1037 (11th Cir. 1989) 9

Cartwright v. *Wilbanks*,
541 S.E.2d 393 (Ga. Ct. App. 2000) 10

Clark v. *Mann*,
562 F.2d 1104 (8th Cir. 1977) 13

TABLE OF AUTHORITIES—Continued

Page(s)

Clark v. *Maurer*,
824 F.2d 565 (7th Cir. 1987) 19

Cobbledick v. *United States*,
309 U.S. 323 (1940)..... 24

Copeland v. *Philadelphia Police Dep't*,
840 F.2d 1139 (3d Cir. 1988),
cert. denied, 490 U.S. 1004 (1989)..... 9, 10, 17, 19

Cox v. *Roskelley*,
359 F.3d 1105 (9th Cir.),
cert. denied, 543 U.S. 924 (2004)..... 19, 25

Donato v. *Plainview-Old Bethpage Cent. Sch. Dist.*,
96 F.3d 623 (2d Cir. 1996),
cert. denied, 519 U.S. 1150 (1997)..... 19

Freeman v. *Poling*,
338 S.E.2d 415 (W. Va. 1985)..... 17

Hogue v. *Clinton*,
791 F.2d 1318 (8th Cir. 1986) 13

Hughes v. *City of Garland*,
204 F.3d 223 (5th Cir. 2000) 13

In re Selcraig,
705 F.2d 789 (5th Cir. 1983) 12, 13

Ledbetter v. *Goodyear Tire & Rubber Co.*,
127 S. Ct. 2162 (2007)..... 23

TABLE OF AUTHORITIES—Continued

Page(s)

Ledford v. *Delancey*,
612 F.2d 883 (4th Cir. 1980) 2, 3, 15, 16

Mattia v. *Delaware River Port Auth.*,
No. CIV.A. 95-4281,
1996 WL 532487 (E.D. Pa. Sept. 20, 1996) 10

Mazaleski v. *Treusdell*,
562 F.2d 701 (D.C. Cir. 1977) 12

McMath v. *City of Gary*,
976 F.2d 1026 (7th Cir. 1992) 16

Med Corp. v. *City of Lima*,
296 F.3d 404 (6th Cir. 2002) 11

Ohio Forestry Ass'n v. *Sierra Club*,
523 U.S. 726 (1998) 21

Olivieri v. *Rodriguez*,
122 F.3d 406 (7th Cir. 1997),
cert. denied, 522 U.S. 1110 (1998) ..... *passim*

Ortwein v. *Mackey*,
511 F.2d 696 (5th Cir. 1975) 12, 13

Paul v. *Davis*,
424 U.S. 693 (1976) 1, 2

Phillips v. *State*,
725 N.W.2d 778 (Minn. Ct. App. 2007) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Poynton v. *Special Sch. Dist.*,
949 F. Supp. 1407 (E.D. Mo. 1996) 11, 14

Raposa v. *Meade Sch. Dist.*,
790 F.2d 1349 (8th Cir. 1986) 14

Simonson v. *Iowa State Univ.*,
603 N.W.2d 557 (Iowa 1999) 10

Stretten v. *Wadsworth Veterans Hosp.*,
537 F.2d 361 (9th Cir. 1976) 17

Swinton v. *Safir*,
720 N.E.2d 89 (N.Y. 1999) 10

Constitution, Statutes, And Rules:

U.S. Const. Amend. XIV ..... *passim*

42 U.S.C. § 1983 1

Virginia Government Data Collection and Dissemination Practices Act, Va. Code Ann.
§§ 2.2-3800 *et seq.* (2005) 25

Fed. R. Civ. P. 15 7

Fed. R. Civ. P. 15(a) 5

Fed. R. Civ. P. 59 7

S. Ct. R. 10 15

TABLE OF AUTHORITIES—Continued

Page(s)

4th Cir. R. 35(a) 15

5th Cir. R. 35 14

8th Cir. R. 35A 14

Miscellaneous:

Br. in Opp., *Olivieri* v. *Rodriguez*,
cert. denied, 522 U.S. 1110 (1998)
(No. 97-927), 1997 WL 33557381 ..... 17, 18

R. Stern *et al.*, *Supreme Court Practice*
(8th ed. 2002) 14, 23, 26

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT

A. Proceedings In The District Court

Respondent Christopher A. Sciolino, a probationary police officer, was fired by petitioner City of Newport News without being given an opportunity to respond to allegations that he had tampered with a patrol car odometer. Pet. App. 60a. Sciolino sued the City and its police chief under 42 U.S.C. § 1983, asserting that they denied him due process by firing him and making these stigmatizing allegations without affording him any opportunity to clear his name. Sciolino invoked this Court's decisions in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), *Paul* v. *Davis*, 424 U.S. 693 (1976), and *Bishop* v. *Wood*, 426 U.S. 341 (1976), which held that the Due Process Clause, U.S. Const. Amend. XIV, requires public employers, when taking actions that seriously affect an individual's ability to make a living, to afford the employee a name-clearing hearing. Sciolino alleged that he had not received any opportunity to clear his name; that the odometer-tampering accusations were false; that they "impugned his good name, honor, reputation, and integrity"; and that the accusations were in the "public record." Pet. App. 57a-58a; see also Pet. App. 57a (alleging that the letter terminating his employment for "deliberate destruction * * * of city property" had been "circulated to various individuals" and placed in a personnel file that "may be available to prospective employers and the public at large").

The district court granted petitioners' motion to dismiss. Explaining that the due process right recognized in *Roth* and *Bishop* is limited to cases where an accusation (a) is made in connection with termination or serious demotion; (b) is false;

(c) imposes a "stigma or other disability that prevent[s the plaintiff] from engaging in other employment"; and (d) is made public, see Pet. App. 39a-40a (citing, *inter alia*, *Roth*, 408 U.S. at 573-575; *Bishop*, 426 U.S. at 348-349; and *Paul*, 424 U.S. at 710-711), the district court focused primarily on whether the complaint adequately pleaded the last of those requirements.

The court observed that the Fourth Circuit's leading decision on the subject, *Ledford* v. *Delancey*, 612 F.2d 883 (4th Cir. 1980), was "not precisely clear" as to whether it was enough to show that accusations were "likely" to be disseminated or, as petitioners maintained, that the right attached only in cases where dissemination of the false assertion had already "actually" occurred. Pet. App. 42a. After considering the parties' arguments and surveying decisions of other courts, the district court determined that the intermediate "likelihood" standard was the widely prevailing approach, Pet. App. 41a, and concluded that it "applies in the Fourth Circuit," Pet. App. 45a.

Because the district court believed both that the complaint alleged only that the police department "*might* * * * show his termination letter to some future prospective employer," Pet. App. 48a, and that Virginia privacy laws would in fact protect against such disclosure, it held that Sciolino did not establish a likelihood of disclosure, Pet. App. 46a. Accordingly, the district court dismissed the complaint for failure to state a claim upon which relief could be granted. Pet. App. 47a-48a.[1]

Sciolino then sought leave to file an amended complaint and moved to alter the judgment, maintaining that he could meet the "likelihood" standard because police agencies in the

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[1] The district court "decline[d] to reach the question of whether the charges * * * imply serious character defects and therefore stigmatize Plaintiff." Pet. App. 48a.

Hampton Roads region had a practice of sharing information about job applicants. Pet. App. 52a. The district court denied both motions on the ground that the evidence supporting the new allegations had been available before the entry of the original judgment. Pet. App. 52a-53a.

B. Proceedings In The Court Of Appeals

Sciolino appealed to the Fourth Circuit, which affirmed the district court's dismissal of the complaint as legally insufficient, Pet. App. 12a, but ruled that the district court should have granted Sciolino the opportunity to amend, Pet. App. 12a-14a.

The Fourth Circuit largely endorsed the district court's analysis of the due process issue. The panel's opinion began by turning aside the City's argument that the charges against Sciolino were not sufficiently stigmatizing. The City's charge that "Sciolino falsely advanced the odometer, thus deliberately destroying city property," it noted, "implies the existence of serious character defects." Pet. App. 5a n.2 (citation omitted).

The court then turned to what it described as the "only element seriously at issue" on appeal – whether the charges were "made public." Pet. App. 5a. It noted that the district court's likelihood-of-dissemination standard fell between the position advanced by Sciolino – that liability attaches where the personnel file *may* be the subject of inspection by prospective employers – and the view urged by the City – that "a specific incident of 'actual publication'" must have occurred. Pet. App. 5a-6a (citation omitted). Rejecting the parties' conflicting claims that *Ledford* and *Bishop* "dictate the standard [each side] espouses," Pet. App. 6a, the Fourth Circuit noted that this "Court has provided helpful guidance as to what the Due Process Clause requires," Pet. App. 9a. It then rejected the "may be available" standard out of concern that it would allow suit in cases where "the plaintiff would be

unlikely to be deprived of future employment or to have his reputation tarnished," giving insufficient weight to *Bishop*'s admonitions that the Constitution does not protect against all "'incorrect or ill-advised personnel decisions'" and "should not 'penalize forthright and truthful communication between employer and employee.'" Pet. App. 9a (quoting *Bishop*, 426 U.S. at 350).

The court also saw an "actual publication" limitation as "contrary to the requirements of the Fourteenth Amendment," citing three principal reasons. Pet. App. 9a. First, it would present employees with a harsh dilemma: They would have to "choose between finding future employment and protecting [their] reputation[s] by not applying for jobs (and thus not risking the release of the stigmatizing allegations)." Pet. App. 10a. Second, the name-clearing hearing would come too late: "If an allegation of actual dissemination were required, the information would have already been communicated to a potential employer, the employee's job opportunities foreclosed, and his reputation damaged *before* any possibility for a name-clearing hearing." *Ibid.* Third, "a requirement that an employer need only provide a name-clearing hearing if it actually disseminates the employee's personnel file to a specific prospective employer would be virtually impossible to enforce." *Ibid.* "Most job applicants," the Fourth Circuit noted, "will never know whether a prospective employer decides against hiring them because of false damaging charges in a personnel file, or for other reasons, and would not even know if the prospective employer has learned of the charges." Pet. App. 10a-11a.

Having held that the district court had "selected the appropriate standard," Pet. App. 11a, the Fourth Circuit affirmed its dismissal of Sciolino's complaint. The court of appeals agreed that the complaint did not allege "a likelihood that prospective employers * * * or the public at large [would] inspect [Sciolino's] file," Pet. App. 11a; rather, the

complaint alleged "only that his file with the charges 'may be available to prospective employers,'" Pet. App. 12a. The Fourth Circuit observed that a plaintiff could meet this standard in one of two ways:

> First, the employee could allege (and ultimately prove) that his former employer has a practice of releasing personnel files to all inquiring employers. Second, the employee could allege that although his former employer releases personnel files only to certain inquiring employers, that he intends to apply to at least one of these employers. In either case, he must allege that the prospective employer is likely to request the file from his former employer.

Pet. App. 11a. Such a standard, the Court explained, "protects the employee's constitutional liberty interests but does not unduly interfere with the employer's personnel administration [and] imposes no enormous costs." Pet. App. 11a-12a.

Although it approved the district court's adoption of the likelihood test and the application of that test to Sciolino's complaint, the court of appeals reversed the district court's order denying leave to amend. Federal Rule of Civil Procedure 15(a) allows amendment, the court of appeals observed, except when it would be prejudicial, in bad faith, or futile, and none of those exceptions applied. Pet. App. 13a. In particular, the court of appeals noted that amendment would not be futile because the proffered amended complaint alleged a City "practice" of disseminating "former employees' personnel files to [l]ocal and regional police departments." *Ibid.* (citation omitted). Accordingly, the court of appeals remanded the case for further proceedings.

The court of appeals declined to address the City's two alternative arguments in favor of affirmance. First, the City had argued that a meeting between the chief of police and

Sciolino before his discharge satisfied any due process requirements. Pet. App. 4a n.1. The court of appeals, however, left that issue for the district court to decide, explaining that "[t]he record in this case is not sufficiently developed to make this sort of evaluation." *Ibid.* Second, the City had argued that it was entitled to judgment under *any* disclosure standard because Virginia law specifically prohibited police agencies from sharing personnel files in these circumstances. Appellee's C.A. Br. at 19-20. The Fourth Circuit explained that this argument had been complicated, if not contradicted, by statements in the City's appellate briefs and oral argument indicating that the City *would* make accusations known to prospective employers in certain "high liability situation[s]." Pet. App. 6a n.3. In light of those indications that release to prospective employers was both "legally authorized" and the City's "practice * * * in some circumstances," the court concluded that this issue too should be resolved by the district court in the first instance. *Ibid.*

Judge Wilkinson dissented from the portion of the decision allowing Sciolino to proceed under the "likelihood" standard. He criticized the court's refusal to embrace an actual dissemination requirement, asserting that the requirement followed directly from *Bishop.* Pet. App. 23a-24a. Judge Wilkinson repeatedly characterized the majority opinion as holding "that a document in a government file drawer can violate a constitutional liberty interest." Pet. App. 17a; see also Pet. App. at 20a, 23a, 25a, 26a. By allowing discharged employees to seek name-clearing hearings where communication of false and stigmatizing accusations was likely, the dissent asserted, the court had "transform[ed] the Due Process Clause," Pet. App. 31a, and "federalize[d] myriad aspects of the local employment relationship without any pretense of democratic sanction," Pet. App. 23a. See also Pet. App. 26a (criticizing majority for selecting "particular procedural safeguards * * * in the abstract and for all time");

Pet. App. 28a (describing the court's rule as "amorphous"). Judge Wilkinson also disagreed with the court's analysis of Rules 15 and 59, asserting that the district court did not abuse its discretion in determining that "interests of finality" outweighed Sciolino's right to amend his complaint after the judgment. Pet. App. 34a n.13.

The Fourth Circuit denied the City's petition for rehearing en banc with no judge – not even Judge Wilkinson – requesting a poll. Pet. App. 55a. Judge Wilkinson, however, favored panel rehearing. *Ibid.*

REASONS FOR DENYING THE PETITION

This case not only arises in an interlocutory posture, but also comes to this Court at an extremely early stage of the litigation. Indeed, all the Fourth Circuit held is that respondent should be given leave to file an amended complaint. The court of appeals, moreover, left open defenses that, if sustained, could allow the City to prevail on remand at an early stage. As a result, it is not yet known whether the legal rule about which petitioners complain will make any difference in this case. No less important, the record here is grossly inadequate to inform this Court's consideration of the still-abstract legal question. For example, the district court has yet to receive testimony concerning petitioners' employment practices or how they square with those in other jurisdictions, nor have the courts below definitively resolved whether state law moots this controversy (or future cases) by mandating a particular treatment of government employees. Those are precisely the sorts of things this Court should know before deciding the underlying constitutional issue, perfectly illustrating why this Court routinely denies review of cases in this highly preliminary posture.

This Court should be particularly wary of wading into this issue at such an early juncture because the only true conflict

among the circuits is wafer-thin. As discussed below, only the Seventh Circuit actually follows a rule inconsistent with the decision below. The Seventh Circuit is in longstanding conflict with a number of other courts, yet this Court (at the urging of, among others, the City of Chicago) has denied review of several petitions raising that conflict. *E.g.*, *Olivieri* v. *Rodriguez*, 522 U.S. 1110 (1998) (No. 97-927). The conflict rarely makes any practical difference to governmental employers, it was tolerable in 1998, and it is tolerable now. Even if there were a reason for this Court suddenly to take an interest in this issue, this factually undeveloped and interlocutory case would present a poor vehicle. Certiorari should be denied.

I. THE OVERWHELMING MAJORITY OF FEDERAL COURTS OF APPEALS AGREE THAT ACTUAL DISSEMINATION IS NOT REQUIRED

Petitioners primarily claim that there exists a deep, wide, and significant conflict between the decision below and those of other state and federal courts that requires this Court's review of the Fourth Circuit's interlocutory decision. Pet. 12-13. Their claim is wildly overstated.

First, there is no disagreement between the Fourth Circuit and other courts on the issue upon which this case actually was decided: The decision below held unequivocally that mere placement of stigmatizing information in a personnel file would *not* give rise to a due process claim. Pet. App. 9a. Indeed, the Fourth Circuit affirmed the district court's 12(b)(6) dismissal on this ground. *Ibid.* Thus, in the Fourth Circuit no less than in the Seventh, the Due Process Clause does not entitle a terminated probationary employee who alleges only that false and stigmatizing accusations have been placed in a government "file drawer," Pet. App. 17a (dissenting opinion), to a name-clearing hearing, see Pet. App. 9a, 14a n.8.

More important, petitioners overstate the degree (and resulting burdens, see pp. 15-18, *infra*) of any conflict as to whether due process requires a name-clearing hearing when public disclosure of false and stigmatizing charges is "likely" – or even "certain" – unless and until the reputational "time bomb" has exploded. Although petitioners correctly read the Seventh Circuit as having closed a door that the decision below left slightly ajar, petitioners' claims that other federal and state courts have committed themselves to the Seventh Circuit's absolute rule do not withstand scrutiny.

For starters, the First Circuit has *not* committed itself to the Seventh Circuit's view that prior disclosure is always required. Although *Burton* v. *Town of Littleton*, 426 F.3d 9, 17 (1st Cir. 2005), does state that "the placement of damaging information in a personnel file, without further dissemination, is not sufficient to trigger the constitutional tort," the same opinion declares that it "would be a different case" if state law subjected personnel files to public disclosure. *Id.* at 17 n.6. In recognizing that a name-clearing claim might proceed when stigmatizing charges have been placed in a *publicly available* personnel file – *i.e.*, in the absence of actual, active dissemination – the First Circuit joins many courts petitioners acknowledge are in line with the Fourth Circuit's view. See, *e.g.*, *Brandt* v. *Board of Coop. Educ. Servs.*, 820 F.2d 41, 44-45 (2d Cir. 1987) (distinguishing situations where information is "kept private" from those where information is "likely" to be accessible to employers) (cited at Pet. 17); *Buxton* v. *Plant City*, 871 F.2d 1037, 1045 (11th Cir. 1989) (public nature of records means publication occurs at time of filing) (cited at Pet. 18).

Nor is the Third Circuit's decision in *Copeland* v. *Philadelphia Police Department*, 840 F.2d 1139 (1988) (cited at Pet. 15), in conflict with the decision below. In *Copeland*, the court rejected the plaintiff's claim of entitlement to a name-clearing hearing, but the plaintiff had not alleged that

dissemination was likely or that it was the employer's regular practice to release personnel files. "He merely allege[d] that the presence of information relating to his termination in his personnel file *raise[d] an inference* that the city intend[ed] to communicate this information to prospective employers." *Id.* at 1148 (emphasis added). *Copeland* thus held that the plaintiff had failed "to produce the evidence necessary to support his assertion that the city violated his liberty interest" in that particular case, not that due process mandates proof of actual dissemination in all cases. *Ibid.* Indeed, a post-*Copeland* district court decision explicitly read Third Circuit law as incorporating the likelihood-of-dissemination standard. See *Mattia* v. *Delaware River Port Auth.*, No. CIV.A. 95-4281, 1996 WL 532487, at *7 (E.D. Pa. Sept. 20, 1996) ("[A] plaintiff has demonstrated dissemination if s/he can show that prospective employers are likely to gain access to his or her personnel file.").

The state court decisions petitioners cite only belie their claim that their approach has many adherents. As petitioners implicitly acknowledge (Pet. 16), the language quoted from the intermediate appellate court decision in *Cartwright* v. *Wilbanks*, 541 S.E.2d 393 (Ga. Ct. App. 2000), dealt only with the elements of a state-law libel claim, and the New York case they cite as "follow[ing] the * * * Seventh Circuit," Pet. 12 (citing *Swinton* v. *Safir*, 720 N.E.2d 89 (N.Y. 1999)), explicitly *adopted* the likelihood-of-disclosure standard for plaintiffs seeking injunctive or declaratory relief. See 720 N.E.2d at 93 ("We conclude that * * * where the discharged employee is seeking * * * expungement of stigmatizing material in a personnel file * * * a likelihood of dissemination is sufficient to trigger one's right to a departmental name-clearing hearing."). Nor do the Iowa and Minnesota decisions petitioners cite adopt an actual-dissemination standard. *Simonson* v. *Iowa State University*, 603 N.W.2d 557 (Iowa 1999) (cited at Pet. 15), held only that "'[l]iberty interests are not violated by the private disclosure of reasons for discharge

from public employment.'" *Id.* at 564 (quoting *Poynton* v. *Special Sch. Dist.*, 949 F. Supp. 1407, 1414 (E.D. Mo. 1996)). *Phillips* v. *State*, 725 N.W.2d 778 (Minn. Ct. App. 2007) (cited at Pet. 15), did not involve stigmatizing information in an employee's personnel file. Neither court considered, let alone rejected, a claim that likely dissemination of a personnel record including stigmatizing accusations would give rise to a name-clearing right.

At the same time, petitioners' attempt to foster the appearance of conflict obscures the overwhelming weight of the decisional authority arrayed against the Seventh Circuit's idiosyncratic rule. In vast numbers, state and federal courts throughout the country – from decisions contemporaneous with *Bishop* v. *Wood*, 426 U.S. 341 (1976), through the present – have not limited the name-clearing right to post-disclosure situations. Thus, petitioners admit (as they must) that the Second, Fourth, Ninth, Tenth, and Eleventh Circuits recognize due process claims where false and stigmatizing information is likely to be disclosed to prospective employers. Pet. 16-19. But petitioners fail to acknowledge that the Fifth, Sixth, Eighth, and D.C. Circuits also do not require prior dissemination.

For example, in *Med Corp.* v. *City of Lima*, 296 F.3d 404 (6th Cir. 2002), the Sixth Circuit made clear that prior dissemination is not necessary to a name-clearing claim. In that case, an ambulance company alleged that the city had violated due process by suspending it from receiving 911 dispatches based on reports of official investigations. While rejecting the claim, the court stated that the company had not "pointed to any * * * evidence in the record suggesting that the City's allegations have been *or will be* publicly disclosed," *id.* at 415 (emphasis added), acknowledging that evidence of likely dissemination would be sufficient. See *id.* at 414 (inquiry should be keyed to whether the city's

accusations "would foreclose [the company's] ability to seek future business opportunities").

The D.C. Circuit also rejects the notion that actual dissemination is a necessary requirement of a name-clearing claim. In *Mazaleski* v. *Treusdell*, 562 F.2d 701 (D.C. Cir. 1977), a terminated federal employee alleged that his employer violated due process by not allowing him to challenge certain reports that led to his firing. The court rejected his claim on the ground that the reasons for which he was fired did "not * * * touch a liberty interest." *Id.* at 714. In discussing the public dissemination requirement, the D.C. Circuit stated that "[o]f course, where the government publicly disseminates information concerning its adverse personnel actions, *or where it simply makes certain information available to prospective employers*, a court must proceed to determine whether the information disclosed is of such a derogatory nature as to infringe a liberty interest of the employee." *Id.* at 712 (emphasis added). The D.C. Circuit thus treats making information "available" as equivalent to actual disclosure.

Despite petitioners' arguments to the contrary (Pet. 19-20), the Fifth and Eighth Circuits also have held that actual dissemination is not necessary to make out a due process name-clearing claim. The Fifth Circuit has clearly held that due process claims may be brought where false and stigmatizing allegations have not yet been publicly disseminated but where the accusations have been included in a personnel file likely to be disclosed to prospective employers. In *Ortwein* v. *Mackey*, 511 F.2d 696 (5th Cir. 1975), the court held that "infringement of one's liberty interest can be found only where the governmental agency has made or *is likely to make* the allegedly stigmatizing charges public." *Id.* at 699 (emphasis added). In *In re Selcraig*, 705 F.2d 789 (5th Cir. 1983), the court reaffirmed this standard: "To prove deprivation of * * * a liberty

interest, a public employee must show that his employer 'has made *or is likely to make* the allegedly stigmatizing charges public.'" *Id.* at 796 n.6 (emphasis added) (citing *Ortwein*, 511 F.2d at 699). Contrary to petitioners' assertions, the Fifth Circuit did not retreat from this understanding when deciding *Hughes* v. *City of Garland*, 204 F.3d 223 (5th Cir. 2000). The dispute in *Hughes* was not over the proper legal standard but over whether the plaintiff had met either the actual-disclosure or likelihood standard. First, the court rejected plaintiff's argument of actual disclosure because dissemination could not be fairly attributed to the city. *Id.* at 227-228. Then, the court rejected the plaintiff's argument that other false and stigmatizing materials "[we]re likely to be disclosed" because state law and city policy foreclosed the possibility. Citing the above-quoted footnote in *Selcraig*, the Fifth Circuit "conclude[d] that the *mere* presence of [stigmatizing materials] in [the employee's] personnel file is insufficient to create a triable issue on the public disclosure element of her claim." *Id.* at 228 (emphasis added). That statement of the law, of course, echoes the Fourth Circuit's conclusion in this case.

Petitioners' effort to extract an "intracircuit split" from the Eighth Circuit's cases is no more convincing. In *Clark* v. *Mann*, 562 F.2d 1104 (8th Cir. 1977), that court held that proof that stigmatizing information "would be available to prospective employers" was sufficient to qualify as "public disclosure" for a due process name-clearing claim. *Id.* at 1116. The necessary implication of that decision – that actual dissemination is not a necessary requirement – was fortified by *Hogue* v. *Clinton*, 791 F.2d 1318 (8th Cir. 1986), which recognized that maintaining a personnel file replete with allegations of wrongdoing "may be a sufficient publication if the defendants made the file available to prospective employers." *Id.* at 1323 n.7. In so holding, the court cited with approval *Bailey* v. *Kirk*, 777 F.2d 567 (10th Cir. 1985), which had allowed a due process claim to proceed without

proof of actual dissemination. The court's decision in *Raposa* v. *Meade School District*, 790 F.2d 1349 (8th Cir. 1986), did not unsettle Eighth Circuit law on this point. In *Raposa*, which was decided shortly *before Hogue*, the court did not squarely address the proper standard for adjudging whether allegedly false stigmatizing information has been "made public." Instead, the court rejected the plaintiff's claim on the ground that the statements at issue were not sufficiently "stigmatizing" to raise due process concerns. *Id.* at 1354. Subsequent district court decisions within the Eighth Circuit have consistently noted that a claim can arise from an employment file being made available to prospective employers, even in the absence of actual dissemination. See, *e.g.*, *Brass* v. *Incorporated City of Manly*, No. C02-3004-PAZ, 2003 WL 1907158, at *7 (N.D. Iowa Apr. 17, 2003); *Poynton*, 949 F. Supp. at 1414.[2]

A strong working consensus has emerged among the courts of appeals that proof of actual dissemination is not required to meet the public disclosure element of a name-clearing claim. It recognizes that the focus of the public disclosure inquiry is the potential foreclosure of future employment opportunities. Petitioners greatly exaggerate the nature and the degree of any differences among the courts of appeals. Only the Seventh Circuit has unambiguously adopted an actual-dissemination requirement; all of the other courts of appeals have either recognized that a due process claim can proceed in the absence of actual dissemination or have stopped short of embracing petitioners' view. This is not the sort of conflict that calls out for this Court's attention.

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[2] In any event, if there are genuine (if minute) differences among decisions within the Fifth and Eighth Circuits, litigants have a ready means of obtaining a definitive resolution. See 5th Cir. R. 35 (determination of causes by the en banc court); 8th Cir. R. 35A (hearing and rehearing en banc); see also R. Stern *et al.*, *Supreme Court Practice* § 4.6 (8th ed. 2002).

II. PETITIONERS SIGNIFICANTLY OVERSTATE THE BURDENS THE DECISION BELOW WOULD PLACE ON GOVERNMENTAL EMPLOYERS

Even less plausible than petitioners' claim of widespread decisional conflict are their efforts to portray the issue as highly consequential for governmental employers. While the petition, echoing the dissenting opinion below, insists in heated terms that the difference between the Fourth and Seventh Circuit's application of the *Roth/Bishop* rule is of broad import to public employers, the reality is to the contrary. Whatever daylight may exist between the two courts' approaches as a formal matter, the practical significance for employers is truly *de minimis*.

Notably, for all the high-pitched rhetoric petitioners borrow from the dissent below – see, *e.g.*, Pet. 9, 22 (accusing court of "do[ing] violence to our constitutional text and reorder[ing] our constitutional structure") – the reality is that not a single judge of that court (not even the author of the dissenting opinion) responded to petitioners' call for rehearing en banc. See 4th Cir. R. 35(a). Whether the lack of judicial interest in plenary reconsideration reflects an appraisal of the decision's correctness, a judgment about the issue's practical effects on governmental employers, the case's interlocutory posture, see pp. 23-26, *infra*, or some combination thereof, these same factors bear on this Court's exercise of its discretionary certiorari jurisdiction. See S. Ct. R. 10.

Petitioners' dire forecasts about the consequences they will suffer under the Fourth Circuit's rule ring hollow, considering that the rule adopted is at best a restatement of *existing* Fourth Circuit law on the subject. The last time that court addressed the issue, *twenty-seven years ago*, in *Ledford* v. *Delancey*, 612 F.2d 883 (4th Cir. 1980), its opinion indicated that liability could be imposed when stigmatizing

information "may be the subject of inspection by prospective employers." *Id.* at 886. Whether or not that was the *holding* of that decision – and whether it is the only or best reading of *Bishop* – may be debatable, but it is not arguable that the decision below (which is arguably even more favorable toward employers) will open floodgates or trample on federalism principles. Tellingly, neither cataclysm seems to have occurred in the quarter-century when *Ledford* was the law governing the five States of the Fourth Circuit. For all petitioners' unsubstantiated assertions, it is implausible that the decision below will work any sea change in the way that local governments in the circuit operate their personnel practices.

Nor is there any reason to believe that the Fourth Circuit is idiosyncratic in this regard. The issue that petitioners claim presents a "sharp conflict" that "mock[s] the clarity" to which the law aspires (Pet. i) can hardly be of critical importance to governmental employers. Both the Fourth Circuit and the Seventh Circuit recognize the employee's entitlement to a name-clearing hearing. The *only* difference is that the Seventh Circuit requires him to wait "until the time bomb explodes," *McMath* v. *City of Gary*, 976 F.2d 1026, 1035 (7th Cir. 1992), while the Fourth Circuit (along with nearly every other federal and state court, see pp. 8-14, *supra*) allows an employee to enforce his right when he can show that harmful disclosure is "likely" – *e.g.*, where, as here, the ticking time bomb (false accusations in a public record) is already limiting his ability to pursue employment. Although public employers may prefer the option of deferring their constitutional duties until the last possible moment in the hope that many violations will go undiscovered or grow stale, that desire hardly warrants this Court's review.

And, of course, not every case will turn on the "actual" versus "likely" disclosure question, so petitioners cannot credibly claim that denying review (or awaiting a proper

vehicle to consider the question) would doom them to substantial liability or injury.[3] Moreover, this particular legal rule does not matter to a probationary employee who receives an opportunity to clear his name as a result of a collective bargaining agreement, of state law, of state constitutional law, or of sound employment practice. Nor does it have any practical significance where the public employer follows a rule of nondisclosure as a matter of either state law or policy. Thus, the City of Chicago, a large government employer within the Seventh Circuit, has noted that "[a]t most, public employers in circuits that have rejected the Seventh Circuit's approach need only adopt procedures designed to ensure that no adverse information about a former employee is communicated to prospective employers." Br. in Opp. at 7, *Olivieri* v. *Rodriguez*, cert. denied, 522 U.S. 1110 (1998) (No. 97-927), 1997 WL 33557381. Chicago went on to explain that:

> it is unclear that the practical significance of requiring employers either to provide name-clearing hearings or to refuse to share information from their personnel files is so great as to warrant [the Supreme Court's] intervention. * * * Indeed, many employers—

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[3] Courts recognize that a plaintiff must show that the government employer (1) made charges against the employee (2) in conjunction with a termination or demotion that were (3) stigmatizing and (4) false and (5) would make finding future employment difficult, if not impossible; and that (6) the stigmatizing charges must have been made public; and (7) that the employer must have denied the plaintiff an opportunity to clear his name. See Pet. App. 4a-5a. As the decided cases make clear, these other elements often pose a higher obstacle for plaintiffs than does any version of the publication requirement. See, *e.g.*, *Stretten* v. *Wadsworth Veterans Hosp.*, 537 F.2d 361, 365-366 (9th Cir. 1976) (inability to perform satisfactorily and unwillingness to deal with coworkers professionally does not preclude future employment opportunities); *Freeman* v. *Poling*, 338 S.E.2d 415, 423 (W. Va. 1985) (unexplained termination or discharge from employment does not create sufficient stigma to invoke liberty interest protection); see also *Copeland* v. *Philadelphia Police Dep't*, 840 F.2d 1139, 1144-1146 (3d Cir. 1988) (plaintiff's hearing was "sufficient to fulfill the due process requirement").

> including the City of Chicago—routinely refuse to provide any information about former employees other than to confirm dates of employment, precisely to avoid litigation.

Id. at 8.

Thus, petitioners' strident appeals to "policy" and abstract principle are untethered to observable real-world experience in the decades since *Roth* and *Bishop*. In fact, it is far from clear that – even in a world where all decisions and policies were driven *exclusively by the desire to avoid federal constitutional litigation* – well-meaning employers would respond dramatically differently to the Fourth and Seventh Circuit rules. On the contrary, while the Seventh Circuit rule may reduce the number of instances where a terminated employee would be able to prove a viable claim, that reduction might be offset, if not exceeded, by the increased damages for which a former employer would be liable once the bomb "exploded." It would also be outweighed by the increased cost and complexity of litigating long after the fact the truth or falsity of the underlying charges and the extent to which the accusations had a causal role in a third party's decision to refuse employment.

III. THE FOURTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DUE PROCESS PRECEDENTS

A. There Is No Conflict Between The Fourth Circuit Decision And *Bishop* v. *Wood*

The assertion that the decision here conflicts with *Bishop* is, on its face, far-fetched. As petitioners must acknowledge, numerous federal and state decisions have carefully examined and applied *Bishop* and sustained due process claims that did not comport with petitioners' proposed "actual dissemination" limitation. Indeed, this Court has been presented with a number of opportunities to "correct" the widely prevailing

understanding of its precedent and has let such decisions stand. See, *e.g.*, *Cox* v. *Roskelley*, 359 F.3d 1105 (9th Cir.), cert. denied, 543 U.S. 924 (2004); *Donato* v. *Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623 (2d Cir. 1996), cert. denied, 519 U.S. 1150 (1997); see also *Olivieri* v. *Rodriguez*, 122 F.3d 406 (7th Cir. 1997), cert. denied, 522 U.S. 1110 (1998); *Copeland* v. *Philadelphia Police Dep't*, 840 F.2d 1139 (3d Cir. 1988), cert. denied, 490 U.S. 1004 (1989).

Of course, the Court in *Bishop* was not presented with, nor did it decide, the precise question presented here: whether an individual who is able to show that his ability to earn a living is impaired by his former employer's false and stigmatizing accusations must wait "[u]ntil the time bomb goes off," *Clark* v. *Maurer*, 824 F.2d 565, 567 (7th Cir. 1987), before obtaining the name-clearing hearing to which the Due Process Clause entitles him. But *Bishop* and the principles and precedents on which it relied strongly *support* the Fourth Circuit's conclusion. *Bishop* dealt with statements that had been made *privately* to the employee, concluding that these could not give rise to a procedural name-clearing right. 426 U.S. at 348. The Court reasoned that such communications – whether true or false, stigmatizing or not – had no "impact on [plaintiff's] reputation" and that the plaintiff "remain[ed] as free as before to seek another [job]." *Ibid.* (quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 575 (1972)). It is wishful thinking on petitioners' part to claim that *Bishop* "made it unambiguously clear," Pet. 10, that an individual who shows that his former employer's false and stigmatizing reasons for dismissal will likely (or certainly) be made known to future employers must wait until the damage is done – "*actual* disclosure" – before seeking a name-clearing hearing. Recognizing that foreclosure of employment opportunity is the touchstone of the procedural right, the Court in *Bishop* held simply that the employer's private communication of accusations to the employee did not constitute the kind of public dissemination that would have

entitled him, as a matter of due process, to an opportunity to clear his name. See 426 U.S. at 348.

By examining whether the employer's practice impermissibly restricted the plaintiff's future employment, the Fourth Circuit correctly understood the teaching of *Bishop*. Indeed, the court of appeals, invoking *Bishop*'s concern that the Due Process Clause not be "'a guarantee against incorrect or ill-advised personnel decisions,'" *agreed with petitioners* that the "mere presence" of stigmatizing information in a personnel file would not in itself entitle an employee to a name-clearing opportunity. Pet. App. 9a (quoting 426 U.S. at 350). But the court rejected, as also inconsistent with *Bishop*, petitioners' proposed "actual dissemination" requirement because "[i]f a plaintiff must allege a specific instance of actual dissemination to a prospective employer, he would not be 'as free as before to seek another job.'" Pet. App. 10a (quoting *Bishop*, 426 U.S. at 348). After carefully examining both *Bishop* and the dissenting judge's objections, the Fourth Circuit concluded that the "likelihood" standard was most consistent with *Bishop*, because when "prospective employers are likely to see the stigmatizing allegations, an employee must choose between finding future employment and protecting his reputation by not applying for jobs." Pet. App. 10a.[4] That conclusion is entirely faithful to *Bishop*.

B. Petitioners' Proffered Limitation Is Wrong

Stripped of the claim of "conflict" with *Bishop*, petitioners' submission reduces to a plea that the Court should grant review here to adopt the "actual disclosure" limitation devised by the Seventh Circuit. In cases like *Olivieri*, *supra*, that court has held that, even where it is "highly likely that the

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[4] Because respondent's proposed amended complaint plainly satisfies the "likelihood" standard, this case does not present the question whether *Bishop* forecloses claims when public revelation is possible, but not likely.

ground of [the employee's] discharge would become known to prospective employers," he must wait for actual disclosure of the false and stigmatizing information before suing a former employer to enforce his name-clearing right. 122 F.3d at 408. As the Fourth Circuit recognized (as has nearly every other court that has considered the issue), it is this requirement that both departs from ordinary judicial norms and is especially inappropriate in light of the nature of the constitutional right at issue.

Requiring employees to wait until *after* "actual" dissemination makes no practical sense. It ensures that cases will come to court long after the central events in dispute (*e.g.*, those bearing on the truth or falsity of the allegations) and in a posture that makes litigation more complex and costly. Even more important, however, the Seventh Circuit rule fails to respect central aspects of the constitutional right at issue. First, the Seventh Circuit's rule ignores the *procedural* essence of the due process guarantee – *i.e.*, the requirement that the former employer afford a *process* whereby the discharged employee can disprove false charges becomes obviously inadequate if it is *only* available after a third party has been told the false information and the stigma has attached. Second, the liberty interest the procedure is meant to safeguard – the right to earn a living free of government interference – is one that can be infringed by both threatened (*i.e.*, "likely") and "actual" government acts. The dissent below notwithstanding, Pet. App. 23a, 32a-34a, there is simply nothing unusual in courts' acting to prevent "likely" injury from coming to pass. Claims like this one implicate the principle that probable (or certain) adverse government action can itself cause injury. See, *e.g.*, *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 153 (1967) ("where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts * * * must be permitted"); *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726,

734 (1998) (recognizing harm of being "force[d] * ** to modify * * * behavior in order to avoid future adverse consequences").

As the Fourth Circuit recognized, see Pet. App. 10a, the likelihood of disclosure itself injures falsely accused employees by discouraging them from seeking new employment. Indeed, it is hard to discern a constitutionally relevant difference between the injury suffered by an individual who knows that prospective employers will, upon his application, be notified of his former employer's false accusation – *i.e.*, this case – and one where they already have been notified. See *Roth*, 408 U.S. at 575 (liberty consists in the former employee's "remain[ing] as free as before to seek another" job).

The Seventh Circuit's "actual disclosure" cases have not seriously reckoned with these powerful constitutional and practical considerations, and that court's stated reasons for imposing the limitation defy common sense. Thus, while that court has described its rule as grounded on the "fundamental principle of mitigation of damages," *Olivieri*, 122 F.3d at 408, forcing individuals like respondent to sue only after dissemination has occurred guarantees that preventable (and compensable) damage will needlessly occur.[5] As a general matter, the mitigation principle could be expected to favor a rule that defuses ticking time bombs rather than waits for them to explode. Moreover, since the gravamen of the constitutional claim here is the ability to earn a living, the more promptly a plaintiff is able to vindicate that right, the

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[5] Whether the mitigation principle might apply in certain cases, *e.g.*, where a fired employee decides not to seek any further employment or when the employee gratuitously calls attention to some false accusation, it has no force in a case like this one, where it is the employer's actions – in firing the employee for false reasons and following a policy or practice of spreading the word to prospective employers – that are responsible for the individual's predicament.

smaller his damages are likely to be and the more readily a factfinder may evaluate his claims. See *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2171 (2007) (noting that "the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened"); *id.* at 2171 n.4.

IV. THIS CASE'S INTERLOCUTORY POSTURE AND PRELIMINARY STATUS MAKE REVIEW BOTH UNNECESSARY AND IMPRUDENT

The decision petitioners ask the Court to review did not hold that Sciolino is entitled to relief on his due process claim, that he was entitled to proceed to trial, or even that his proposed amended complaint had definitively stated a claim on which relief could be granted. The issue presented to the Fourth Circuit – and resolved in Sciolino's favor – was whether the district court *erred in denying leave to file an amended complaint.* The Fourth Circuit held that it would not be "futile" to afford Sciolino an opportunity to show that disclosure of his former employer's false allegations was "likely," Pet. App. 13a, and remanded the case to the district court for further *pre-trial* proceedings. Indeed, the decision held open the possibility that petitioners might yet obtain a judgment on alternative grounds, recognizing that certain confusing and uncertain questions of fact and state law were best sorted out at the trial court level. This Court's usual practice is not to intervene in litigation at this very early stage, see R. Stern *et al.*, *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002), and petitioners offer no compelling reason for deviating from this sound rule.

On the contrary, the concerns animating the practice of withholding review until final judgment are fully present here. As with all interlocutory appeals, certiorari petitions at the pleading stage threaten to multiply and protract the proceedings, requiring courts to devote scarce resources to

resolving issues that may ultimately be of no consequence to the disposition of the case before them – and to do so on records that are underdeveloped with respect to key factual or legal issues. See generally *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940) (explaining the policies militating against "piecemeal disposition on appeal of what for practical purposes is a single controversy").

Here, the proceedings have reached only the complaint stage, and, even apart from its doubtful significance for the federal courts generally, it is yet unclear that the constitutional issue petitioners ask the Court to decide immediately will be of concrete – let alone dispositive – significance *in this case*. For example, although the proposed amended complaint includes allegations that petitioners treat Sciolino's personnel file as a public record and are likely to disseminate the accusations to his prospective employers, no discovery has yet been conducted. The record is thus silent as to whether and to whom the City has *already* communicated the accusations. Were discovery to disclose that such communications had, in fact, occurred, even the restrictive rule of law petitioners urge would be satisfied.

At the same time, the Fourth Circuit's legal standard will have actual significance in this case only if Sciolino is able to carry his burden on all the other issues – *e.g.*, that the allegations were false and that he did not, in fact, have a sufficient opportunity to clear his name. Indeed, *petitioners* have insisted (and remain free to urge on remand) that there are other independent legal grounds entitling them to judgment.[6] Moreover, unlike cases where a petitioner would

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[6] Petitioners acknowledge that the case could be resolved on remand without the district court ever reaching the dissemination issue, were it to accept their argument that Sciolino received a constitutionally sufficient name clearing opportunity. Pet. 8 n.1. This issue was briefed in the Fourth Circuit, see Appellee's C.A. Br. 22-24, but that court concluded that the factual record was insufficiently developed to decide it. Pet. App. 4a n.1.

suffer some unusual impending consequence in the absence of this Court's immediate intervention, the effect of the Fourth Circuit's decision is merely to require the City to re-file its motions in the district court and defend a relatively straightforward civil lawsuit.

Finally, this case is in significant ways less legally straightforward than a mine-run pretrial dismissal. Most notably, issues central to the dispute are bound up with unresolved questions of state law. Thus, the district court – at *petitioners'* urging – understood the Virginia Government Data Collection and Dissemination Practices Act, Va. Code Ann. §§ 2.2-3800 *et seq.* (2005), to prevent disclosure of Sciolino's personnel files, Pet. App. 46a-47a, an interpretation the Fourth Circuit questioned, see Pet. App. 6a n.3.[7] If, after further development of the record, the district court's initial understanding of this state-law question were to prove correct, that could affect Sciolino's ability to meet the Fourth Circuit's "likelihood" standard (and might render the Fourth Circuit's choice among standards academic).

Thus, even if there were merit to petitioners' claims that the issue they raise warrants this Court's review, there are distinct reasons why the Court should not take it up in such a preliminary and awkward procedural posture. If, as petitioners assert, the issue is a recurring one, there will be other cases presenting the issue on more fully developed records. See, *e.g.*, *Olivieri* v. *Rodriguez*, 122 F.3d 406 (7th Cir. 1997) (affirming grant of summary judgment for defendant), cert. denied, 522 U.S. 1110 (1998); *Cox* v. *Roskelley*, 359 F.3d 1105 (9th Cir.) (affirming summary judgment grant for

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[7] Indeed, the courts below have had great difficulty pinning down the City's own account of its pertinent policies and practices. The Fourth Circuit determined, at a minimum, that Newport News admitted both that it is "legally authorized to share personnel files with prospective employers" and that "it is its practice to do so in some circumstances." Pet. App. 6a n.3.

plaintiff), cert. denied, 543 U.S. 924 (2004). Denying review now would not preclude the petitioners here from seeking review if and when a final judgment in this case may be entered against them. See Stern *et al.*, *supra*, § 4.18, at 260. Without a more fully developed record, the Court would be poorly positioned to resolve the issue, especially in a case that already has at its center awkward and uncertain questions of state law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 07-159

IN THE
Supreme Court of the United States

CITY OF NEWPORT NEWS, VIRGINIA; DENNIS A. MOOK,
Petitioners,

v.

CHRISTOPHER A. SCIOLINO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI 1

I. THE DECISION BELOW CONFLICTS WITH *BISHOP v. WOOD* 2

II. THE FEDERAL CIRCUITS ARE DIVIDED OVER THE QUESTION PRESENTED HERE 3

III. THE QUESTION PRESENTED IS OF GREAT PRACTICAL IMPORTANCE TO STATE AND LOCAL GOVERNMENTS 9

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Bell Atl. Corp. v. Twombly,
127 S. Ct. 1955 (2007) 12

Bishop v. Wood,
426 U.S. 341 (1976) 1, 2, 3, 11

Brandt v. Bd. of Coop. Educ. Servs.,
820 F.2d 41 (2d Cir. 1987) 6

Burton v. Town of Littleton,
426 F.3d 9 (1st Cir. 2005) 5

Buxton v. Plant City,
871 F.2d 1037 (11th Cir. 1989) 8

Cartwright v. Wilbanks,
541 S.E.2d 393 (Ga. Ct. App. 2000) 9

Chabal v. Reagan,
841 F.2d 1216 (3d Cir. 1988) 6

Cooper v. Univ. of Washington,
2007 U.S. Dist. LEXIS 82969 (W.D. Wash. Nov. 8, 2007 8

Copeland v. Phila. Police Dep't,
840 F.2d 1139 (3d Cir. 1988) 6

Cox v. Roskelley,
359 F.3d 1105 (9th Cir. 2004) 8, 9

Johnson v. Martin,
943 F.2d 15 (7th Cir. 1991) 2

TABLE OF AUTHORITIES
(continued)

Page(s)

Mattia v. Del. River Port Auth.,
1996 WL 532487 (E.D. Pa. Sept. 20, 1996) 6, 7

Mosca v. Cole,
217 Fed. Appx. 158 (3d Cir. 2007) 6

Olivieri v. Rodriguez,
122 F.3d 406 (7th Cir. 1997) 5, 8, 9, 11

Phillips v. Minnesota,
725 N.W.2d 778 (Minn. Ct. App. 2007) 7

Swinton v. Safir,
720 N.E.2d 89 (N.Y. 1999) 9

OTHER AUTHORITIES

Jenny S. Brannan, Comment, *The Publication Debate in Deprivation of Occupational Liberty Claims*,
47 Kan. L. Rev. 171 (1998) 10

Nat Stern, *Defamed But Retained Public Employees: Addressing A Gap In Due Process Jurisprudence*,
31 Hofstra L. Rev. 795 (2003) 9

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The response brief brings to mind the Groucho Marx adage, "Who are you going to believe, me or your own eyes?" Our opening petition presented three grounds for review: (1) the decision below directly conflicts with the express language of this Court's decision in *Bishop v. Wood*, 426 U.S. 341 (1976); (2) the decision below deepens a long-standing and pervasive disagreement among the court of appeals; and (3) the decision below is of great practical importance to local and state governments. Pet. 10-27. As to the first point, respondent continues (Resp. Br. 18-20) to read *Bishop*'s "public disclosure" requirement to mean "no public disclosure" or, in Judge Wilkinson's words, to "wish[] for ambiguity where there is none." As to the circuit court disagreement, respondent sees only a "wafer-thin" dispute (Resp. Br. 8) despite numerous statements by federal and state appellate judges (and legal academics) describing the persistent circuit conflict presented here. And, as to the practical consequences of the decision below, respondent claims the circuit "conflict rarely makes any practical difference to governmental employers" (Resp. Br. 8), despite the amicus brief filed by six local and state organizations that explains how the personnel changes mandated by the decision below will significantly affect state and local governments. In short, respondent's answers disregard ordinary English, distort evidently conflicting case law, and ignore the perspectives of those best-placed to evaluate the significant impact of this case.

Certiorari is warranted.

I. THE DECISION BELOW CONFLICTS WITH *BISHOP v. WOOD*

In *Bishop v. Wood*, this Court held that a public employee who is dischargeable at will is not deprived of "liberty" when "there is no *public disclosure* of the reasons for the discharge." 426 U.S. at 348 (emphasis added). As the Court explained, if a "communication was not *made public*, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honor, or integrity' was thereby impaired." *Id.* (emphasis added). The natural – indeed, the only linguistically defensible – reading of those terms is that a terminated government employee's constitutional right to a name-clearing hearing arises only when the government *actually discloses* the basis for termination. *See* App. 24a.

Despite this clear language, respondent suggests that lower courts are free to authorize a due process lawsuit based on allegations that a government employer is "likely" to disclose stigmatizing allegations. Resp. Br. 18-19. But this Court's directions are not so easily evaded. Whether the reason for termination has been made public is quite different from whether the reason is likely to be made public at some future time. In Judge Wilkinson's words, the majority's claim – adopted by respondent – that *Bishop* "did not 'resolve the question'" "wishes for ambiguity where there is none." App. 24a. *Accord Johnson v. Martin*, 943 F.2d 15, 17 (7th Cir. 1991) ("Defining 'public disclosure' in a way which encompasses 'no public disclosure' is an exercise we choose not to embrace.").

Moreover, the substance of the decision below is directly at odds with the holding in *Bishop*. If the "likelihood of disclosure" standard adopted by the court below were the correct standard, the plaintiff in *Bishop* would have prevailed. As Justices Brennan and Marshall noted in their *Bishop* dissent, there was a significant likelihood that in the future the employer would have disclosed the reason for the employee's termination. *See* 426 U.S. at 352 (finding "no reason to believe that respondents will not convey these actual reasons to petitioner's prospective employers"). Needless to say, it is not the province of a lower court to overrule this Court's decisions.

Implicitly recognizing that the court below has overstepped, respondent places extraordinary reliance on a few instances whereby this Court has declined to grant petitions presenting similar questions. Resp. Br. 19. Of course, the reasons for a denial of certiorari are numerous and previous denials do not suggest that an issue is not worthy of this Court's attention. To the contrary, repeated petitions on a single issue may well indicate that the issue arises with sufficient frequency that review is warranted.

In short, respondent's brief fails to reconcile the conflict between *Bishop* and the decision below. Because the majority's decision conflicts with binding precedent of this Court, certiorari should be granted.

II. THE FEDERAL CIRCUITS ARE DIVIDED OVER THE QUESTION PRESENTED HERE

Judge Wilkinson starts his dissent from the decision below as follows: "There is at least one thing upon which the majority and I can agree: The cir-

cuits are split as to whether stigmatizing allegations can deprive a former government employee of a constitutional liberty interest before the allegations are disseminated to prospective employers or others." App. 18a. Three circuits – the First, Third, and Seventh – have followed *Bishop* and held that a government employer need not provide a name-clearing hearing to a terminated employee in the absence of actual public dissemination of the reasons for termination. Pet. 13-16. Seven circuits, however, impose a constitutional requirement that a government employer provide a hearing to a terminated employee even where the reasons for the termination have not been actually disseminated. The Second, Fourth, and Tenth Circuits recognize due process claims where the allegedly false and stigmatizing charges in a personnel file are "likely" to be disseminated to prospective employers. Pet. 16-18. Other circuits have adopted an array of varying but similarly permissive requirements. Pet. 18-20. In short, as Judge Wilkinson summarized, the question presented here not only implicates a "circuit split" but has "generated answers with shades and permutations that mock the clarity law must provide for human conduct." App. 20a.

1. In downplaying the scope of the disagreement among the courts, respondent primarily argues that only the Seventh Circuit, and not the First Circuit or Third Circuit, requires actual disclosure to support a due process liberty deprivation lawsuit. But we were far from the first to suggest this circuit court alignment. Both the majority and dissenting decisions below read those courts to require actual disclosure. App. 8a, 18a. Judge Posner has reached the same

conclusion. *See Olivieri v. Rodriguez*, 122 F.3d 406, 408 (7th Cir. 1997) ("Our court, however, insists on dissemination, *as do the First and Third Circuits.*" (citations omitted) (emphasis added)). A straightforward reading of the relevant decisions confirms these conclusions.

The First Circuit in *Burton v. Town of Littleton*, 426 F.3d 9, 17 (1st Cir. 2005) held that "the placement of damaging information in a personnel file, without further dissemination, is not sufficient to trigger the constitutional tort." Although plaintiff's termination letter in that case had been sent to the Commissioner of Education, that was insufficient evidence of publication because the court traditionally had only recognized truly public dissemination, such as "'at public meetings or to the press.'" *Id.* at 16 (quoting *Beitzell v. Jeffrey*, 643 F.2d 870, 879 (1st Cir. 1981)). As the court emphasized, "*Bishop* is concerned not with *hypothetical or merely possible reputational harms* to public employees, but with significant infringements on their liberty interests." *Id.* at 16 (emphasis added).

Respondent points to language in the court's opinion suggesting that the analysis might have been different "[i]f the Commissioner were obligated to release the document." Resp. Br. 9 (citing *Burton*, 426 F.3d at 17 n.6). But even if the court's aside could be read as a signal that it might find a liberty interest implicated when charges are placed in documents subject to mandatory disclosure under state law, that is a far cry from the broad and amorphous likelihood-of-disclosure standard adopted in the Fourth Circuit and elsewhere. *See, e.g., Brandt v. Bd. of Coop. Educ. Servs.*, 820 F.2d 41, 44 (2d Cir.

1987) ("what is sufficient to constitute 'public disclosure' will vary with the circumstances of each case").

Respondent's discussion of Third Circuit case law is also unconvincing. In *Copeland v. Philadelphia Police Department*, 840 F.2d 1139 (3d Cir. 1988), the court rejected plaintiff's liberty interest claim on the basis of his failure to demonstrate actual dissemination. Respondent argues *Copeland* is not on-point here because the plaintiffs did not allege a likelihood of dissemination. Not so. Plaintiff in that case had asserted that "the presence of information relating to his termination in his personnel file raises an inference that the *city intends to communicate this information to prospective employers*" – in other words, that the city was likely to so disclose. *Id.* at 1148 (emphasis added). Third Circuit authority is in conflict with the decision below. *See Mosca v. Cole*, 217 Fed. Appx. 158, 163 (3d Cir. 2007) (rejecting claim where "there is no evidence that [defendants] told anyone that [plaintiff] was terminated for" making inflammatory statements); *Chabal v. Reagan*, 841 F.2d 1216, 1223-24 (3d Cir. 1988) ("We have made it clear that a protected liberty interest is not implicated if the government did not in fact disseminate any allegedly stigmatizing information to the public.").[1]

Several state law appellate courts are also in line with the First, Third, and Seventh Circuits. For ex-

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[1] The district court decision relied on by respondent did not "read Third Circuit law as incorporating the likelihood-of-disclosure standard," but rather relied on a *Second Circuit* decision for the proposition that likelihood is enough. Resp. Br. 10. *See Mattia v. Del. River Port Auth.*, 1996 WL 532487, at *7 (E.D. Pa. Sept. 20, 1996).

ample, in *Phillips v. Minnesota*, 725 N.W.2d 778, 784 (Minn. Ct. App. 2007), the court found no deprivation of a liberty interest where defendant "did not make public either the letter informing [plaintiff] of [its] decision not to rehire him or the investigator's report substantiating the sexual-harassment allegation." *See* Pet. 15. Respondent claims that *Phillips* "did not involve stigmatizing information in a personnel file." Resp. Br. 11. But constitutional doctrine cannot turn on whether a stigmatizing allegation is placed in a personnel file as opposed to an investigation file. The *Phillips* plaintiff was fired for sexual harassment, and his due process suit was rejected because this stigmatizing reason for his termination was not actually made public. *Phillips* conflicts with the decision below.

2. Respondent does not dispute that the decision below is in accord with the decisions of the Second and Tenth Circuits. Thus, at a minimum, there are three circuits in disagreement with First, Third, and Seventh circuits.[2] But the disagreement is broader than that.

Although respondent states that the cases in the Fifth and Eighth Circuits are not internally inconsistent and in fact line up with the Fourth Circuit decision, Judge Wilkinson stated the opposite, describing

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[2] Respondent mistakenly claims that the decision below was "at best a restatement of existing Fourth Circuit law on the subject." Resp. Br. 15-16. The panel below explicitly recognized that its prior case law "d[id] not reach the question before [it]," App. 7a n.4, and for that reason looked to the other courts comprising the circuit split in analyzing the question. *See also* App. 8a ("neither *Bishop* nor *Ledford* resolve the question before us").

the Fifth Circuit's cases as being in "internal tension," App. 18a, and the Eighth Circuit cases as "not fit[ting] neatly" into the "camps" established by the other circuits, App. 19a. *See also* Pet. 19-20. Judge Posner similarly commented that the Fifth and Eighth Circuits "have hedged." *Olivieri*, 122 F.3d at 408.

Respondent also attempts to collapse the "public record" standard found in some jurisdictions into the "likelihood of disclosure" standard adopted by the court below. Resp. Br. 9. These standards, however, are not the same. The Ninth and Eleventh Circuits have held that a liberty interest is implicated only when the stigmatizing charges have been placed in documents that are public records as a matter of state law. *See Cox v. Roskelley*, 359 F.3d 1105 (9th Cir. 2004); *Buxton v. Plant City*, 871 F.2d 1037 (11th Cir. 1989). But the "public record" standard provides absolutely no guidance when the document in question is not a public record. *Compare Cox*, 359 F.3d at 1110 *with Cooper v. Univ. of Washington*, 2007 U.S. Dist. LEXIS 82969, at *23-24 (W.D. Wash. Nov. 8, 2007) (recognizing "split" and following "the rule adopted in the First, Third, and Seventh Circuits – that plaintiff must show that defendant publicized to the community or potential employers the grounds for plaintiff's dismissal"). Moreover, even if these courts could be construed as siding with the court below (and the Second and Tenth Circuits), the circuit court disagreement is merely that much starker.

* * *

As with the direct conflict with *Bishop*, there is no serious doubt that the circuits are divided on the question presented. In addition to Judge Wilkinson's explication below, courts and commentators have frequently recognized the longstanding and pervasive split of authority on this question. *See, e.g.*, *Cox*, 359 F.3d at 1115 n.2 (Hall, J., dissenting) ("other circuits considering substantially similar issues had reached diametrically different conclusions."); *Olivieri*, 122 F.3d at 408 (recognizing "inter-circuit conflict"); *Cartwright v. Wilbanks*, 541 S.E.2d 393, 396 (Ga. Ct. App. 2000) ("We recognize that the federal circuit courts are sharply and evenly divided on this issue."); *Swinton v. Safir*, 720 N.E.2d 89, 92 (N.Y. 1999) ("The Federal Circuit courts that have addressed the issue are almost equally divided.").[3] The Court should take this opportunity to introduce clarity to a confused area of constitutional law.

III. THE QUESTION PRESENTED IS OF GREAT PRACTICAL IMPORTANCE TO STATE AND LOCAL GOVERNMENTS

1. The question presented is of great importance to state and local government employers throughout the country. As petitioners' *amici* explain in detail, the rule adopted in the Fourth Circuit forces gov-

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[3] *See also* Nat Stern, *Defamed But Retained Public Employees: Addressing A Gap In Due Process Jurisprudence*, 31 Hofstra L. Rev. 795, 800 (2003) ("[F]ederal courts of appeals have split on whether stigmatizing material in an employee's personnel file must actually be disseminated to meet *Bishop*'s requirement of publication."); Jenny S. Brannan, Comment, *The Publication Debate in Deprivation of Occupational Liberty Claims*, 47 Kan. L. Rev. 171, 183 (1998) (discussing "sharp split of authority" among federal courts of appeals).

ernment employers to conduct substantially more hearings, exposes them to additional litigation and its attendant costs and burdens, and significantly undermines the value of probationary employment. *See* Brief of International Municipal Lawyers Association, International Public Management Association For Human Resources, Local Government Attorneys of Virginia, Inc., National League of Cities, National Public Employer Labor Relations Association, and Virginia Association of Counties as *Amici Curiae* in Support of Petitioners at 5-14. It also provides strong but perverse incentives to employers not to document the grounds for termination at all in order to limit their legal exposure. *See* Pet. 25-26.

For example, *amici* (at 3, 5-6) explain that the almost 90,000 state and local government units in the United States make widespread use of probationary employment. Probationary status is an efficient means of evaluating an applicant for permanent employment before granting the substantial protections of civil service status. *Amici* emphasize that any constitutional right to a name-clearing hearing most directly affects probationary employees because, unlike permanent employees, probationary employees may not otherwise expect a guaranteed hearing to appeal a discharge. Under the decision below, however, responsible public employers may feel compelled to provide a name-clearing hearing every time they terminate a probationary employee. Thus, advocating the "likelihood" standard "comes close to arguing that there is no such thing as proba-

tionary public employment." *Olivieri*, 122 F.3d at 409.[4]

In sum, the brief of local and state *amici* refute respondent's claim that the "practical difference" between the constitutional standards is "truly de minimis." Resp. Br. 15. The *amici* explain (at 8-9) that the "likely-disclosure standard would require employers to provide many more hearings than are required under the actual-disclosure standard"; that these "additional hearings are expensive"; and that the Fourth Circuit's standard will "impose other litigation costs" because it "would bring several vague standards into play every time a probationary employee is terminated." *See Amici* Br. at 11-12 ("the word 'likely' is so vague that its meaning cannot be stated in advance"; "amorphous 'stigmatizing standard'"; "sufficiency of procedure is governed by yet another fuzzy standard"). Just as the conflict with *Bishop* and among the Circuits is undeniable, the practical importance of the issue presented is beyond serious question.

2. Finally, there is no merit to respondent's "vehicle" arguments. Resp. Br. 23-26. The question that has divided the courts is a question of law – what elements must be pled, and ultimately proved, to sustain a claim that a government employee has been deprived of a liberty interest on the basis of stigmatizing charges accompanying his termination. No amount of discovery or further development of

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[4] Respondent notes that the City of Chicago opposed certiorari in *Olivieri*. Resp. Br. 17-18. But *of course* the city opposed further review in that case: it had prevailed in the Seventh Circuit, and the court had adopted the rule advocated here that actual disclosure is required.

the record will aid the Court in resolving that question. It is equally irrelevant that there are other defenses available to defendant on which it might prevail on remand. Resp. Br. 23. If petitioners are correct that respondent has not, and could not, plead the elements of a constitutional tort, then they are entitled to judgment now in order to avoid the cost and inconvenience of continued litigation. Indeed, the entire purpose of requiring parties to plead the elements of their claims is to save the parties the effort and expense of conducting discovery and other pre-trial litigation. *See Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966 (2007) ("when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court'" (quoting 5 Charles Allen Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1216 (2d ed. 1987) (further citations omitted)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

CITY OF NEWPORT NEWS, VIRGINIA, ET AL.,

Petitioners,

v.

CHRISTOPHER A. SCIOLINO,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES, LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC., NATIONAL LEAGUE OF CITIES, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AND VIRGINIA ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

REASONS FOR GRANTING THE PETITION 5

I. PROBATIONARY STATUS – WITHOUT A CONSTITUTIONAL RIGHT TO A HEARING UPON TERMINATION – IS OF GREAT PRACTICAL IMPORTANCE TO STATE AND LOCAL GOVERNMENTS 5

A. State And Local Governments Rely Heavily On Probationary Status To Evaluate Candidates For Tenured Employment 5

B. The Likely-Disclosure Standard Substantially Increases The Cost And Decreases The Usefulness Of Probationary Status 7

1. The likely-disclosure standard subjects governments to substantially higher costs 8

2. The likely-disclosure standard decreases the usefulness of probationary status 12

C. State And Local Employers Already Have Sufficient Incentives To Protect The Interests At Stake 13

TABLE OF CONTENTS—continued

Page

II. THE DECISION BELOW UNDERMINES CONSTITUTIONAL DOCTRINES THAT ARE IMPORTANT TO STATE AND LOCAL GOVERNMENTS 15

A. A Persistent Circuit Split Engenders Inconsistency In The Constitutional Obligations Of State And Local Governments 15

B. The Likely-Disclosure Standard Substantially Alters Important Constitutional Doctrines 15

1. The likely-disclosure standard expands employee due-process rights beyond the limits set by this Court 16

2. The likely-disclosure standard lowers the threshold for standing to sue state and local governments 17

3. The likely-disclosure standard shrinks the zone of federal deference to state and local governments with respect to management of their own employees 18

CONCLUSION 23

APPENDIX A 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. City of Massillon, 999 WL 174851 (Oh. App. Feb. 22, 1999) 21

Anderson v. Green, 513 U.S. 557 (1995) 17

Arnett v. Kennedy, 416 U.S. 134 (1974) 22

Bd. of County Comm'rs, Wabaunsee County, Kansas v. Umbehr, 518 U.S. 668 (1996) 9

Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 19

Bishop v. Wood, 426 U.S. 341 (1976) ..... *passim*

Brandt v. Bd. of Co-op. Educ. Servs., 820 F.2d 41, 44 (2d Cir. 1987) 9

Brennan v. Hendrigan, 888 F.2d 189 (1st Cir. 1989) 13

Byrn v. Metro. Bd. of Pub. Educ., 1991 WL 7806 (Tenn. Ct. App. Jan. 30, 1991) 21

Christian v. New York State Dep't of Labor, Div. of Employment, 414 U.S. 614 (1974) 7

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 17

Connick v. Myers, 461 U.S. 138 (1983) 19

DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854 (2006) 18

Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) 18

Jackson v. Hartig, 645 S.E.2d 303 (Va. 2007) 20

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 17, 18

Mathews v. Eldridge, 424 U.S. 319 (1976) 10

TABLE OF AUTHORITIES—continued

Page(s)

McQuirk v. Donnelley, 189 F.3d 793 (9th Cir. 1999) 14

Moore v. County of Cook, 2000 WL 989618 (7th Cir. June 12, 2000) 21

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) 22

Olivieri v. Rodriguez, 122 F.3d 406 (7th Cir. 1997) 13

Paul v. Davis, 424 U.S. 693 (1976) 19

Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49 (2005) 8

Somers v. City of Minneapolis, 245 F.3d 782 (2001) 21

Stratman v. Brent, 683 N.E.2d 951 (Ill. App. Ct. 1997) 14

STATUTES, RULES AND REGULATIONS

5 C.F.R. § 315.801 5

5 C.F.R. § 315.806 7

5 U.S.C. § 3321 5

5 U.S.C. § 7511(a)(1)(A) 7

5 U.S.C. § 7513(c) 7

42 U.S.C. § 2000e, *et seq.* 14

SUP. CT. R. 37.6 1

VA. CODE. ANN. § 8.01-46.1 14

MISCELLANEOUS

ANN BOWMAN & RICHARD C. KEARNEY, STATE AND LOCAL GOVERNMENT (6th ed. 2005) 20

TABLE OF AUTHORITIES—continued

Page(s)

ROBERT H. ELLIOTT & ALLEN L. PEATON, THE PROBATIONARY PERIOD IN THE SELECTION PROCESS: A SURVEY OF ITS USE AT THE STATE LEVEL (1994) ..... *passim*

ERICA L. GROSHEN & ENG SENG LOH, WHAT DO WE KNOW ABOUT PROBATIONARY PERIODS?, *in* FORTY-FIFTH ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES (1993) 6

RICHARD C. KEARNEY & DAVID G. CARNEVALE, LABOR RELATIONS IN THE PUBLIC SECTOR (3d ed. 2001) 12

3 MCQUILLIN MUN. CORP. § 12.81 (3d ed.) 21

LLOYD G. NIGRO ET AL., THE NEW PUBLIC PERSONNEL ADMINISTRATION (6th ed. 2007) 6

JOHN E. SANCHEZ & ROBERT D. KLAUSNER, STATE AND LOCAL GOVERNMENT EMPLOYMENT LIABILITY § 1.11 (2007) 11

U.S. CENSUS BUREAU, COMPENDIUM OF PUBLIC EMPLOYMENT (2004) 5

U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS (2002) 5

U.S. GEN. ACCOUNTING OFFICE, COLLECTIVE BARGAINING RIGHTS: INFORMATION ON THE NUMBER OF WORKERS WITH AND WITHOUT BARGAINING RIGHTS (2002) 20

U.S. MERIT SYSTEMS PROTECTION BOARD, THE PROBATIONARY PERIOD: A CRITICAL ASSESSMENT OPPORTUNITY (2005) 6, 7

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments from across the United States.[1] International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization that consists of more than 1,400 local governments, including cities, counties, and subdivisions thereof, as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. International Public Management Association for Human Resources ("IPMA-HR") represents the interests of human resource professionals at the federal, state and local levels of government. Local Government Attorneys of Virginia, Inc. ("LGA") is a nonprofit, professional corporation whose members represent 145 localities, including counties, cities, and towns located throughout Virginia. Among other activities, LGA participates in litigation that, in the judgment of LGA, is significant to local governments. National League of Cities ("NLC") is the country's largest and oldest organization serving municipal government, representing more than 19,000 United States cities and towns. NLC strengthens local government through advocacy, research, and information sharing on behalf of hometown America. National Public Employer Labor Relations Association

[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

("NPELRA") is a nonprofit association representing 3,000 labor-relations and personnel professionals who work on behalf of states, counties, cities, schools, and special governmental districts throughout the United States. Virginia Association of Counties ("VACo") is a nonprofit, statewide, independent association organized in 1934 to support county officials and to effectively represent, promote, and protect the interests of counties to better serve the people of Virginia. VACo's membership includes all 95 Virginia counties.

This case involves the relationship between public employers and their probationary employees. As explained in this brief, state and local governments rely heavily on probationary employment as integral to the selection of tenured employees. *Amici* therefore have a vital interest in the decision below, which would effectively create a right to a hearing at the time of a probationary employee's dismissal. Because of the importance of this issue to *amici* and their members, *amici* support the Petitioners' request that the Court grant certiorari in this case.

SUMMARY OF ARGUMENT

This case is about whether *Bishop v. Wood*, 426 U.S. 341 (1976), means what it says. In *Bishop*, the Court held that a terminated employee has no right to a name-clearing hearing unless allegedly-stigmatizing information about the employee is "made public." *Id.* at 348. In the decision below, the Fourth Circuit altered this "made public" requirement by holding that it can be met by a showing of "likely disclosure": by the mere *potential* for disclosure at some future date. Pet. App. at 9a.

This decision, if permitted to stand, would subject thousands of government entities to a new

constitutional obligation with respect to their own employees: holding a name-clearing hearing every time a probationary employee is terminated for a reason that would be stigmatizing if it were disclosed. (The right to a name-clearing hearing most directly affects probationary employees because, unlike many permanent employees, they do not otherwise receive a hearing to appeal a discharge.) *Amici* support the Petitioners' view that *Bishop* in fact does mean what it says: An employee is not entitled to a hearing unless the reason for termination is "made public."

I. In the experience of *amici*, the likely-disclosure rule ignores the practical realities of administering public employment systems. Thousands of state and local government entities rely on probationary periods to screen employees before offering them permanent employment, but the likely-disclosure standard substantially reduces the value of probationary employment. This new standard compels public employers to conduct a substantially greater number of hearings. It also subjects them to much more parallel litigation, such as whether future disclosure of employee information is "likely"; whether the reasons the employee was terminated are "stigmatizing"; and whether any procedure the employer does provide passes the balancing test that governs the sufficiency of constitutionally required procedures.

This increase in costs is unnecessary. The terms of probationary employment already have been addressed by state legislators, by other state and local officials, and in many cases by public-employee unions. These actors have worked out satisfactory balances based on factors that they are best situated to evaluate. Among these factors are exist-

ing incentives to provide a hearing at the time a probationary employee is terminated if there is a sufficiently high risk that the decision is wrong and the stigmatizing information will become public.

II. Review is warranted for the additional reason that the decision below does damage to legal principles that are important to state and local governments. First, by deepening a split that involves at least eight circuits, it helps to foster substantial uncertainty and geographical inconsistency about the constitutional obligations of state and local governments.

Second, the decision below slights three important constitutional doctrines. The first is *Bishop's* bright-line limitation on the liberty interests of probationary employees. By giving probationary employees the right to a hearing whenever they can predict that this information will be disclosed at some later date, the decision below substantially expands the constitutional obligations of public employers.

The likely-disclosure approach also would work a substantial revision of the Article III standing requirement. Instead of requiring actual injury, as mandated by this Court's precedents, the new approach recognizes a claim based on a mere *prediction* of future disclosure. This weakens a limitation on lawsuits that is important to state and local governments, who are vulnerable to many kinds of litigation.

The likely-disclosure approach also weakens principles of federalism. By establishing that the legislative and policy choices of state and local governments can be overridden without a concrete constitutional justification, it violates the principle of

deference to state and local governments about the management of their own employees.

REASONS FOR GRANTING THE PETITION

I. PROBATIONARY STATUS – WITHOUT A CONSTITUTIONAL RIGHT TO A HEARING UPON TERMINATION – IS OF GREAT PRACTICAL IMPORTANCE TO STATE AND LOCAL GOVERNMENTS

A. State And Local Governments Rely Heavily On Probationary Status To Evaluate Candidates For Tenured Employment

There are more than 87,000 state and local government units in the United States. U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS 1 (2002), available at http://tinyurl.com/2qpacf. Many of these units are quite small. In all, about 62,000 of these units employ fewer than 25 employees. U.S. CENSUS BUREAU, COMPENDIUM OF PUBLIC EMPLOYMENT 248 Table 20 (2004) (available at http://tinyurl.com/2jfjkf).

Local governmental entities make widespread use of probationary employment. See ROBERT H. ELLIOTT & ALLEN L. PEATON, THE PROBATIONARY PERIOD IN THE SELECTION PROCESS: A SURVEY OF ITS USE AT THE STATE LEVEL 51 (1994); see also Appendix A (listing state statutes providing for probationary employment in all 50 states and Washington, DC). The same is true of the federal government. See 5 U.S.C. § 3321 (authorizing probationary status in federal employment); 5 C.F.R. § 315.801 (estab-

lishing probationary period for competitive federal positions).

Probationary status is an efficient means of evaluating an applicant for permanent employment before granting the substantial protections of civil-service status. "[T]he probationary period is the last stage in the screening process; no matter how much effort is put into making pre-employment tests valid, they may not screen out some applicants who actually lack the ability, motivation, or work habits needed to perform satisfactorily in particular jobs." LLOYD G. NIGRO ET AL., THE NEW PUBLIC PERSONNEL ADMINISTRATION 110 (6th ed. 2007). Therefore, "[u]ntil the probationary period has been completed, a probationer is still an applicant for employment." U.S. MERIT SYSTEMS PROTECTION BOARD, THE PROBATIONARY PERIOD: A CRITICAL ASSESSMENT OPPORTUNITY i (2005). See also ERICA L. GROSHEN & ENG SENG LOH, WHAT DO WE KNOW ABOUT PROBATIONARY PERIODS?, *in* FORTY-FIFTH ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES 10-11 (1993) (discussing the use of probationary periods, or "post-hire evaluation periods").

Once a probationary employee successfully completes a probationary period, the employee usually receives the "relative security of tenure" provided by civil-service status. NIGRO at 236; see also *id.* at 27 (noting the origins of civil-service protections). An initial probationary period "gives supervisors the chance to evaluate new employees' situations and to approve for permanent status only those who have done satisfactory work." *Id.* at 110.

Governments value probationary status because it allows them to bring applicants into the workplace, and make decisions about permanent

employment, without the kind of hearing that is required to show "cause" to dismiss tenured civil servants. "If awkward or inappropriate placements need to be remedied, this period is the easiest time for management" because "management does not have to prove its case, as it does when the employee has passed probation and is on permanent status." ELLIOTT & PEATON, *supra*, at 48 (internal quotation marks omitted). As the United States Merit Protection Board explained, "[i]n the case of new-hire probationers, the public interest is served by limiting certain rights, including the right to appeal an adverse action. These limitations ensure that agencies can promptly and effectively act upon their assessments of probationers." U.S. MERIT SYSTEMS PROTECTION BOARD, THE PROBATIONARY PERIOD: A CRITICAL ASSESSMENT OPPORTUNITY i-ii.[2]

B. The Likely-Disclosure Standard Substantially Increases The Cost And Decreases The Usefulness Of Probationary Status

Against this background, requiring employers to provide name-clearing hearings based only on likely disclosure would be costly and counterproductive. The opinion below brushed aside these costs, see Pet. App. at 12a (stating that the lowered threshold would impose no "enormous costs" (internal quotation marks omitted)), but they are substan-

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[2] Federal probationary employees generally are not entitled to a hearing in connection with dismissal for work performance or conduct. *See* 5 U.S.C. § 7511(a)(1)(A); 5 U.S.C. § 7513(c); 5 C.F.R. § 315.806. See also *Christian v. New York State Dep't of Labor, Div. of Employment*, 414 U.S. 614, 619 n.4 (1974) ("a probationary federal employee has no right to appeal a discharge").

tial. Adoption of the likely-disclosure standard effectively imposes a constitutionally required unfunded mandate on public employers—a mandate that is especially unfair because state and local governments are powerless to change it.

1. The likely-disclosure standard subjects governments to substantially higher costs

As we now explain, the cost is the result of an increase in the number of hearings and an increase in the amount of parallel litigation.

a. The likely-disclosure standard would require employers to provide many more hearings than are required under the actual-disclosure standard. Under *Bishop*, a right to a hearing does not arise unless the information at issue is disclosed. Under the likely-disclosure standard, however, the right to a hearing arises as soon as the information comes into existence and the employee alleges that future disclosure is likely—regardless of whether the information ever is disclosed.

These additional hearings are expensive. As this Court has recognized, all due process guarantees come at a substantial cost in dollars and inefficiency. See, *e.g.*, *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 59 (2005) (noting that administrative hearings involving special-education program would cost $8,000 to $12,000 each). Although cost will vary with the amount of procedure required, every name-clearing proceeding requires agency employees to take time away from the tasks for which they were hired. Proceedings generally involve participation by employees with knowledge of the underlying facts, and by employees who made and approved the termination decision. Proceedings often require attor-

ney time as well, to monitor less formal proceedings or to participate in more formal ones.

b. In addition to the cost of the additional hearings, the new standard also would impose other litigation costs. Unless employers provide hearings to every former employee who seeks one, employers also must litigate some of those requests. The likely-disclosure standard would bring several vague standards into play every time a probationary employee is terminated. This invites a substantial increase in lawsuits, because "[u]ncertainty breeds litigation." *Bd. of County Comm'rs, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668, 698 (1996) (Scalia, J., dissenting).

i. The first vague standard is the likely-disclosure test itself. Where the actual-disclosure test is sharp, the word "likely" is so vague that its meaning cannot be stated in advance, but "will vary with the circumstances of each case," as the Second Circuit acknowledged. *Brandt v. Bd. of Co-op. Educ. Servs.*, 820 F.2d 41, 44 (2d Cir. 1987).

This vagueness makes suing easier for disappointed probationary employees, because it invites them to litigate the meaning of "likely" threshold. They will, of course, try to push that threshold as low as possible. This vagueness also breeds general unfairness, because it leads to inconsistency in the conclusions reached by different courts that apply the standard. And it makes planning harder for state and local governments, because it does little to tell them when they must provide hearings at the time of termination, or how they can defend themselves once they are sued.

ii. All of this uncertainty is compounded by the amorphous "stigmatizing" standard requirement.

As Judge Wilkinson noted in his dissent, "[a]dverse personnel actions are by definition taken on the basis of unfavorable assessments." Pet. App. at 28a (Wilkinson, J., dissenting). Especially when combined with the vagueness of the "likely" standard, the "stigmatizing" standard invites disappointed probationary employees to transform garden-variety selection decisions into constitutional litigation.

c. Public employers cannot avoid litigation even by conceding the likely disclosure and "stigmatizing" issues, and providing a name-clearing opportunity to every employee who requests it. An employee can simply challenge the sufficiency of that opportunity, forcing the employer to litigate that issue as well. And the sufficiency of procedure is governed by yet another fuzzy standard, the balancing test set out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), so that it is difficult, at best, for an employer to predict what level of procedure a court will find sufficient. See Pet. App. at 27a-28a (Wilkinson, J., dissenting). Again, this case illustrates the problem. On a motion to dismiss, the courts below could not resolve whether the procedure that Newport News did provide to Sciolino at the time of his termination was constitutionally sufficient. See *Sciolino*, Pet. App. at 4a n.1.

Nor should employers be forced to provide a hearing to every former probationary employee who demands one. Engaging in overcompliance might be prudent management, because it errs on the side of avoiding litigation over whether future disclosure is "likely." But it is wasteful, because it results in needless costs for thousands of government employers. Worse, it aggravates the insult to federalism: Where the likely-disclosure standard already slights federalism by imposing a constitutional requirement

based on a mere prediction of future disclosure, over-compliance extends that new requirement to cover *all* terminated probationary employees, whether or not future disclosure is likely.

d. Under the likely-disclosure test, the act that triggers all of this litigation is the employer's documentation of its reason for terminating a probationary employee. But documenting personnel decisions benefits both employees and employers, because it increases the accuracy of evaluations and discourages arbitrary decisions. It benefits public employers, and taxpayers, for the additional reason that it enables employers to defend against the claims that inevitably arise from negative personnel decisions. See *Sciolino,* Pet. App. at 28a (Wilkinson, J., dissenting) (observing that the threat of suit for unlawful discrimination "leaves governments with little choice but to document the reasons for major personnel actions").

This same documentation, however, immediately subjects these employers to due-process claims and related litigation. Under the likely-disclosure test, employers cannot escape this bind even in cases where the negative information will never be distributed beyond the employer. This imposes an unfair Hobson's choice on state and local governments.

Placing employers in this bind does nothing to help employees. To the contrary, it discourages employers from telling terminated probationary employees why they failed to achieve permanent status. At least one expert already recommends that employers follow this course. See JOHN E. SANCHEZ & ROBERT D. KLAUSNER, STATE AND LOCAL GOVERNMENT EMPLOYMENT LIABILITY § 1.11 (2007) (recommending that governmental employers "not make

any personnel file entries containing 'cause' for removal" of provisional employees).

e. The likely-disclosure standard more generally disadvantages probationary employees, current and future, by increasing the costs of probationary employment. This encourages employers to substitute pre-probationary screening devices such as testing. But testing presents its own problems; some public-employee unions criticize it as discriminatory, see RICHARD C. KEARNEY & DAVID G. CARNEVALE, LABOR RELATIONS IN THE PUBLIC SECTOR 197 (3d ed. 2001), and it may be less valid than probationary employment in identifying applicant ability, see ELLIOTT & PEATON, *supra*, at 48. Indeed, the higher costs created by the new standard create incentives for employers to reduce the availability of probationary employment altogether. For potential probationary employees, this reduces the availability of an important means of access to public employment.

2. The likely-disclosure standard decreases the usefulness of probationary status

So the likely-disclosure rule requires more hearings, generates more litigation, and infuses routine record-keeping with new constitutional risks. As a practical matter, these changes require responsible public employers to show some cause for terminating probationary employees, or to risk serious and unpredictable legal consequences. That is why, as Judge Posner explained, advocating the "likely" standard "comes close to arguing that there is no such thing as probationary public employment—that no public employee can be fired without a hearing because if he is, and the ground of the discharge impugns his fitness for employment in a similar job, as

it very often will, his employer will have violated his constitutional rights, no matter how secretive the employer is about the ground." *Olivieri v. Rodriguez*, 122 F.3d 406, 409 (7th Cir. 1997). The First Circuit expressed the same view in *Brennan v. Hendrigan*, 888 F.2d 189, 196 (1st Cir. 1989) ("[t]o require it would simply erase in many instances the constitutional distinction between the 'at will' and the 'tenured' employee" (internal quotation marks omitted)).

C. State And Local Employers Already Have Sufficient Incentives To Protect The Interests At Stake

Even if the likely-disclosure rule did not place such heavy burdens on state and local governments, it could not be justified. A new rule is simply unnecessary. As Judge Wilkinson pointed out, public employers already have the incentive to require hearings in appropriate cases. Pet. App. at 32a (Wilkinson, J., dissenting). Because of the existing *Bishop* requirement for a hearing upon actual disclosure of the disputed information, a public employer that terminates a probationary employee already must consider the likelihood that a hearing will be required at some later time. This likelihood depends on, for example, the probability that the employee might assert that the reasons for the dismissal are stigmatizing, and the probability that the disputed information will be disclosed to a potential employer. The employer also must consider any increased cost due to deferring a second look at the relevant information to a later time, when memories are not as fresh and assembling the record is more expensive.

The employer's decision is affected by other incentives as well. In particular, many public employers are already subject to defamation claims if they

provide false information to prospective employers. See, *e.g.*, *McQuirk v. Donnelley*, 189 F.3d 793, 799 (9th Cir. 1999) (action for defamation available under California law against county sheriff who allegedly provided a negative job reference for employee); *Stratman v. Brent*, 683 N.E.2d 951, 957 (Ill. App. Ct. 1997) (action for slander available under Illinois law against police chief who allegedly provided negative job reference for former officer); Virginia Code § 8.01-46.1 (withdrawing immunity in defamation cases from employers who disseminate false information about employees). In addition, public employers who discriminate can be sued under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e, *et seq.*

Taken together, these incentives force public employers to take into account the costs of placing false information in the files of former employees. This calculus, performed at the local level by thousands of governmental units across the country, necessarily takes into account the probability that the information is stigmatizing, is wrong, and will be disclosed to a third party. As Judge Wilkinson explained, "[l]eaving the analysis to democratically responsive local authorities * * * makes it possible to strike balances suited to local needs and facilitates adaptation to changing circumstances and new insights." Pet. App. at 26a. The thousands of governmental entities across the country are better situated than a single court to determine when a hearing is the most effective means for vindicating the values advanced by the rules that already govern the relationship between state and local governments and their employees.

II. THE DECISION BELOW UNDERMINES CONSTITUTIONAL DOCTRINES THAT ARE IMPORTANT TO STATE AND LOCAL GOVERNMENTS

The decision below also warrants review because of its effect on the law: It aggravates the existing split among the circuits, and it weakens important constitutional principles.

A. A Persistent Circuit Split Engenders Inconsistency In The Constitutional Obligations Of State And Local Governments

Because state and local governments make such extensive use of probationary status, any applicable constitutional requirements should be clear and uniform. With respect to the right to a name-clearing hearing at the end of probationary employment, however, the law varies across the circuits. The circuit split is discussed in detail in the Petition for Writ of Certiorari filed by the City of Newport News, at 12-13.

The Court should resolve this split. The discord among the circuits engenders uncertainty about the constitutional obligations of thousands of state and local governments. It also perpetuates geographic inconsistency, with obligations varying based on the circuit in which a state or local employer is located. Dispelling this uncertainty and restoring uniformity in the law warrant this Court's intervention.

B. The Likely-Disclosure Standard Substantially Alters Important Constitutional Doctrines

The decision below also weakens constitutional principles in three areas that are important to state and local governments.

1. The likely-disclosure standard expands employee due-process rights beyond the limits set by this Court

a. The first area is the clear limitation that this Court placed on the liberty interests of probationary employees. *Bishop* established that an employee's liberty interests do not come into play unless stigmatizing information about the employee is "made public." 426 U.S. 341, 348. But the decision below holds that those interests are affected as soon as an employee predicts that stigmatizing information is likely to be disclosed in the future.

b. This is a significant expansion of employee due-process rights and, in equal measure, of the constitutional obligations of public employers. Simply put, the decision below holds that a bright line "public-disclosure" requirement is met by no disclosure at all. Worse, it bases that conclusion on a concern that this Court already has rejected. At the heart of the decision below is the concern that stigmatizing information contained in an employee's file might chill that employee's job search. According to the majority, the employee would not want to "risk[] the release of the stigmatizing allegations" to potential employers. Pet. App. at 9a. *Bishop*, however, considered and rejected this argument. See 426 U.S. at 348-349. Indeed, two *dissenting* justices (Justices Brennan and Marshall) would have required a hearing because of exactly that concern. See *id.* at 352, 353 n.2 ("there is no reason to believe that [the former employer] will not convey the[] actual reasons [for the dismissal] to [the employee's] prospective employers," because "[i]t is only common sense, to be sure, that prospective employers will inquire as to petitioner's employment * * * .").

c. This expansion of constitutional obligations in the context of probationary employees has broader implications for state and local governments. The creation of a constitutional right based on a plaintiff's *prediction* about the future exposes state and local governments to litigation wherever plaintiffs can complain that some possible, predicted government action has a present chilling effect on them. In light of the widespread, varied activities of state and local governments, the range of potential claims is enormous.

2. The likely-disclosure standard lowers the threshold for standing to sue state and local governments

a. The expansion of employee liberty interest claims also requires alteration of the Court's limitations on standing. The decision below gives former probationary employees standing to sue based only on a prediction of potential injury, but "[t]he Constitution does not give courts the power to predict future harms and declare the Constitution violated before the possible harms transpire." Pet. App. at 23a (Wilkinson, J. dissenting). This is because "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct * * * ." See also *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983) (collecting cases).

b. This limitation is important because it ensures that the courts intervene only in "live dispute[s]." *Anderson v. Green*, 513 U.S. 557, 559

(1995); see discussion in *Lujan*, 504 U.S. at 559-560. It is especially important to state and local governments, because it reduces the number of federal-state confrontations. In this vein, this Court recently explained the importance of the standing requirement in preventing federal courts from becoming "virtually continuing monitors of the wisdom and soundness of state fiscal administration," *Daimler-Chrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1864 (2006) (citations and internal quotation marks omitted) (holding that state and municipal taxpayers lacked standing to press a Commerce Clause challenge to certain state and municipal tax provisions).

The standing requirement thus protects the principle of federalism from needless encroachment. It also protects state and local governments, which are conspicuously inviting litigation targets, from claims based on plaintiffs' predictions of *future* state action. The likely-disclosure standard substantially reduces this protection.

3. The likely-disclosure standard shrinks the zone of federal deference to state and local governments with respect to management of their own employees

a. The likely-disclosure standard also would alter the boundaries that "sound principles of federalism and the separation of powers" place on "permanent judicial intervention in the conduct of governmental operations." *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1961 (2006). It would mandate exactly what this Court recently ruled out in *Garcetti*: "judicial oversight of communications between and among government employees and their superiors in the course of official business." *Id.* at 1961.

The Court has repeatedly affirmed the importance of these boundaries in the area of public employment. In *Bishop* itself, the Court cautioned that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," 426 U.S. at 349, and rejected the "far-reaching view that almost every discharge implicates a constitutionally protected liberty interest," *id.* at 350 n.14. Again in *Connick v. Myers*, 461 U.S. 138, 146 (1983), the Court reiterated that government officials should normally "enjoy wide latitude in managing their offices," so that "ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable." (citations omitted).

b. The decision below erases these boundaries by constitutionalizing a new element of the public employment relationship based only on the *potential* disclosure of employee information. It requires no actual injury—no concrete constitutional stake. This new encroachment is, therefore, unjustified.

This expansion also is open-ended, because it extends the constitutional right beyond its putative support in underlying state tort law. The Court has warned that, although a liberty interest exists to protect an "independent source [of interests] such as state law rules," *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972), constitutional liberty interests do not extend as far as state tort law: A liberty interest is not "invaded" every time the government violates state tort law. *Paul v. Davis*, 424 U.S. 693, 700 (1976). After all, respect for the underlying limits of state-law is the reason a probationary em-

ployee is limited to a liberty interest in the first place; out of respect for the state-law meaning of employment-at-will, the Constitution does not recognize a property interest in probationary jobs. *Bishop,* 426 U.S. at 343-347. Yet the decision below extends constitutional liberty interests *beyond* underlying state law. It creates a liberty interest where the employee has no underlying state-law interest. See, *e.g.*, *Jackson v. Hartig*, 645 S.E.2d 303, 307 (Va. 2007) (noting that publication is required for a defamation claim).

c. The new rule further erodes the limits dictated by principles of federalism because it imposes this new constitutional rule in an area that receives the attention of numerous actors, including state legislatures, local lawmakers, and other officials, as well as public-employee unions. All 50 state legislatures have addressed probationary periods. See Appendix A. In many jurisdictions, local entities or officials adopt additional policies. See ELLIOTT & PEATON, *supra* at 52 (summarizing source of probationary status in legislation and in policy statements). Still further input often comes from the collective bargaining process. Most states provide public employees with collective-bargaining rights,[3] and "[a]pproximately 31 percent of state and 43 percent of local government workers belong to unions," ANN BOWMAN & RICHARD C. KEARNEY, STATE AND LOCAL

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[3] See U.S. GEN. ACCOUNTING OFFICE, COLLECTIVE BARGAINING RIGHTS: INFORMATION ON THE NUMBER OF WORKERS WITH AND WITHOUT BARGAINING RIGHTS 8-9 & n.14 (2002) (stating that "26 states and the District of Columbia * * * provide collective bargaining rights to essentially all employees" and "12 states have laws that provide bargaining rights to specific groups of workers," while employees in other states "may be covered by local laws").

GOVERNMENT 228 (6th ed. 2005). These unions often bargain over the use and terms of probationary status.[4]

Because of this variety of decision makers, the terms of probationary employment vary significantly by job category and governmental entity. See, *e.g.*, 3 MCQUILLIN MUN. CORP. § 12.81 (3d ed.) (collecting examples). The most basic condition is the length of the required probationary period, which ranges from as short as six months to as long as three years. See ELLIOTT & PEATON, *supra*, at 48, 52, 57. Various public employers also differ over whether probationary employees are entitled to hearings upon termination. Probationary employees typically can be let go without cause, but some public employers do provide hearings upon dismissal. See ELLIOTT & PEATON, *supra*, at 53 (noting that a few states provide probationary workers some measure of appeal rights); *Byrn*, 1991 WL 7806, at *8 (under collective-

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[4] See, *e.g.*, *Somers v. City of Minneapolis*, 245 F.3d 782, 787 n.5 (2001) (where collective bargaining agreement ("CBA") lengthened the statutory probationary period, the court stated, "We suspect there are good reasons for negotiating a longer probationary period for some types of jobs, but in any event it was the union's prerogative to do so."); *Moore v. County of Cook*, 2000 WL 989618, at *2 (7th Cir. June 12, 2000) (CBA reduced probationary period from six to three months); *Anderson v. City of Massillon*, 1999 WL 174851 (Oh. App. Feb. 22, 1999) (CBA prohibited administrative appeal of termination of probationary employees); *Byrn v. Metro. Bd. of Pub. Educ.*, 1991 WL 7806, at *8 (Tenn. Ct. App. Jan. 30, 1991) ("State law, however, is not the only source of a non-tenured teacher's rights. The board employing the teacher may, by contract, create and establish additional rights. This is precisely what the collective bargaining process * * * is all about.").

bargaining agreement, probationary employees are entitled to a hearing upon dismissal).

The majority's approach overrides the arrangements reached by the diverse state and local actors. It denies these actors the power to work out, in thousands of local contexts, the most appropriate relationships between public employers and their own employees. The majority's approach conflicts with this Court's teaching that "the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs," *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring), and unduly reduces the states' ability to act as laboratories of democracy. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

* * *

In sum, the decision below undercuts several constitutional doctrines that, taken individually and together, provide important protections to state and local governments: the requirement for actual disclosure before a terminated probationary employee obtains a cognizable liberty interest; the requirement for actual harm before a plaintiff has standing to sue; and the requirement for deference to state and local government personnel practices in the absence of any harm that justifies intervention. Preserving the clarity and vigor of these important doctrines warrants review of the decision below by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A: SAMPLE OF GENERAL AND SPECIFIC STATE LAWS ON PROBATIONARY EMPLOYEES

Alabama	ALA. CODE § 36-26-101 (school employees); ALA. CODE § 11-43-188 (law enforcement employees)
Alaska	ALASKA STAT. § 39.25.150(7)
Arizona	ARIZ. REV. STAT. ANN. § 41-783 (8)
Arkansas	ARK. CODE ANN. §§ 14-49-304(b)(7) (municipal employees); § 14-50-304(b)(7) (same)
California	CAL. GOV'T CODE §§ 19170
Colorado	COLO. CONST. art. 12 § 13(10); COLO. REV. STAT. § 24-50.125(5); COLO. REV. STAT. § 22-63-103(7) (school employees)
Connecticut	CONN. GEN. STAT. § 5-196(28); § 5-230
Delaware	DEL. CODE ANN. tit. 29, § 5922(a)
District of Columbia	D.C. CODE § 5-105.04 (police officers); § 5-543.01 (police officers and firefighters)
Florida	FLA. STAT. § 110.213(1)
Georgia	GA. CODE ANN., § 45-20-2 (16); § 45-20-6(d)
Hawaii	HAW. REV. STAT. § 76-27(a)(1)
Idaho	IDAHO CODE ANN. § 67-5309(j)

Illinois	55 ILL. COMP. STAT. 5/3-14023 (county employees)
Indiana	IND. CODE § 14-9-8-12; § 36-8-3.5-12(h) (law enforcement employees)
Iowa	IOWA CODE § 8A.413 (8)
Kansas	KAN. STAT. ANN. § 75-2946
Kentucky	KY. REV. STAT. ANN. § 18A.111
Louisiana	LA. REV. STAT. ANN. § 17:446 (school employees)
Maine	ME. REV. STAT. ANN. 5 § 7051; § 30-A § 2701 (municipal and county employees)
Maryland	MD. CODE ANN. STATE PERS. & PEN. § 6-202(1) (school employees); § 11-303 (termination)
Massachusetts	MASS. GEN. LAWS ch. 31, § 34
Michigan	MICH. COMP. LAWS § 38.413(1)
Minnesota	MINN. STAT. § 43A.16
Mississippi	MISS. CODE ANN. §§ 21-31-17; 21-31-65 (municipal employees)
Missouri	MO. REV. STAT. 36.250
Montana	MONT. CODE. ANN. 7-3-4410 (municipal employees)
Nebraska	NEB. REV. ST. § 23-2525(7) (county employees); § 79-828 (school employees)
Nevada	NEV. REV. STAT. § 284.290; § 391.3197 (school employees)
New Hampshire	N.H. REV. STAT. ANN. § 100-A:3 (police); § 21-P:29 (firefighters)

New Jersey	N.J. STAT. ANN. § 19-30E.2 (municipal police)
New Mexico	N.M. STAT. § 22-8E-7 (school employees); N.M. STAT. § 29-2-9 (police)
New York	N.Y. CIV. SERV. § 63
North Carolina	N.C. GEN. STAT. ANN. §§ 96-29, 126-4; 25 N.C. ADMIN. CODE 1C.0404
North Dakota	N.D. CENT. CODE, § 54-44.3-12
Ohio	OHIO REV. CODE ANN. § 124.27(C)
Oklahoma	OKLA. STAT. 74 § 840-4.13(D)-(E)
Oregon	OR. REV. STAT. § 240.316(1)
Pennsylvania	71 PA. CONS. STAT. ANN. § 741.603(a)
Rhode Island	R.I. GEN. LAWS § 36-4-28
South Carolina	S.C. CODE ANN. § 8-17-320(16)
South Dakota	S.D. CODIFIED LAWS § 3-6A-21; S.D. ADMIN. R. 55:01:01:01(26)
Tennessee	TENN. CODE ANN. § 8-30-312
Texas	TEX. EDUC. CODE ANN. § 21.102(b) (teachers); TEX. GOV. CODE ANN. § 411.007(f) (public safety employees)
Utah	1953 UTAH CODE ANN. § 67-19-16; UTAH ADMIN. CODE r.477-5-2(2)
Vermont	VT. STAT. ANN. tit. 3, § 310
Virginia	VA. CODE ANN. § 2.2-2812; VA. CODE ANN. § 22.1-303(A)-(B) (teachers)
Washington	WASH. REV. CODE ANN. § 41.06.133(3)

West Virginia	W. VA. CODE ANN. § 29-6-10(9); W. VA. CODE R. § 143-1-10.1(a)
Wisconsin	WIS. STAT. ANN. § 230.28(1)
Wyoming	006-140-004 WYO. CODE R. § 7